Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES SPAULDING, LYN SWONGER, DONALD L. INMAN, WILLIAM N. NANCE,
and all others similarly situated,
Petitioners,

v.

UNITED TRANSPORTATION UNION
and
UNION PACIFIC RAILROAD COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Did the Court of Appeals decision wrongly hold that the Surface Transportation Board has exclusive jurisdiction of breach of the duty of fair representation claims?**

2. **Did the Court of Appeals fail to follow previous decisions as to equitable tolling by determining upon disputed issues of material facts that the petitioners' claims regarding the St.. Louis and Kansas City hubs are barred by the statute of limitations?**

PARTIES TO THE PROCEEDING

Petitioners

JAMES SPAULDING, LYN SWONGER, DONALD L. INMAN, WILLIAM N. NANCE, AND ALL OTHERS SIMILARLY SITUATED

Respondents

UNITED TRANSPORTATION UNION
and
UNION PACIFIC RAILROAD COMPANY

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The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 279 F.3d 901. A copy of the Opinion is included in the Appendix (App.") hereto at App. p. 1. The opinion of the United States District Court for the District of Kansas is not reported. A copy of the Opinion is included in the Appendix hereto beginning at App. p. 24.

JURISDICTION

On January 26, 2001, Petitioners filed an Appeal from a decision of the United States District Court for the District of Kansas which decision the Tenth Circuit Court of Appeals affirmed on February 5, 2002. This Petition for Writ of Certiorari is filed within 90 days of the Court of Appeals Opinion filed February 5, 2002. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

STATUTORY PROVISIONS INVOLVED

49 U.S.C. §11321(a) (See App. p. 53).

49 U.S.C. §11324(b)(4) (See App. p. 54).

49 U.S.C. §11326 (See App. p. 58).

28 U.S.C. §2342(5) (See App. p. 60).

New York Dock Conditions (See App. p. 62).

STATEMENT OF THE CASE

Petitioners were hired originally by the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") to work on its Tucumcari line. In 1980 the St. Louis Southwestern Railway Company ("SSW"), a former affiliate of the Southern Pacific Transportation Company ("Southern Pacific"), purchased part of Rock Island, including the Tucumcari line, after that railroad declared bankruptcy. Petitioners are currently employed by Union Pacific Railroad Company ("Union Pacific") as a result of its 1996 merger with Southern Pacific and SSW. Petitioners are members of the United Transportation Union ("UTU").

SSW purchased Rock Island's Tucumcari line pursuant to an agreement executed March 4, 1980 ("March 4 Agreement") which provided for preferential hiring of Rock Island employees by SSW. SSW and UTU subsequently entered in to an implementing agreement on February 22, 1982 ("1982 Implementing Agreement"), which provided in part that former Rock Island employees hired by SSW before the 1982 Implementing Agreement would receive a system seniority date of March 24, 1980 while those hired after would use their actual date of hire by SSW.

Generally the date on which a railroad employee took his or her first compensated trip for his or her current employer constitutes that employee's seniority date. When two employees bid for the same job, the one with the earlier seniority date normally wins the bid. However, when a less senior employee retains a "prior right" at a particular job location, such as the Tucumcari line, he or she can prevail at that location over a more senior bidder who lacks such a locational prior right. This gives the employee with the prior right the equivalent of a higher seniority date as to the job and at that location.

After the execution of the 1982 Implementing Agreement SSW recalled its furloughed trainmen before hiring any of the former Rock Island trainmen. Petitioners joined other former Rock Island trainmen in a class action against SSW and UTU over the denial of preferential hiring and seniority rights provided in the March 4 Agreement. *Volkman v. United Transportation Union*, 724 F. Supp. 1282 (D. Kan. 1989). Extensive litigation and a court approved settlement confirmed March 24, 1980 as the system seniority date for former Rock Island employees hired by SSW prior to the 1982 Implementing Agreement and established that former Rock Island employees, including Petitioners, were entitled to prior rights at their SSW terminal of first hire There is dispute as to how much it could be modified through future collective bargaining.

Petitioners had thus received protected seniority status through the March 4 Agreement, the 1982 Implementing Agreement and the *Volkman* decision and settlement. The March 4 Agreement gave them the preferential right to be hired for the additional jobs generated by the takeover of the Tucumcari line by SSW and guaranteed to them the right to proper representation in the negotiated implementing agreements. This obligated SSW and UTU to recognize Petitioners' rights in future mergers affecting the Tucumcari line.

During the time of the operation of the SSW after the resolution of the *Volkman* court proceedings, these Petitioners had the ability to exercise their seniority to the jobs on the Tucumcari trackage to the exclusion of all other SSW employees on the trackage. In addition, Petitioners received a March 24, 1980 date on the system roster in order to set their seniority date for bidding jobs on other SSW trackage. Petitioners were led to believe that their Rock Island hire date was kept on the roster for protection in the case of a future merger. In other words, in the case of a

merger, their Rock Island date would be noted for purpose of any merging of the rosters by dovetailing.

On August 6, 1996, the Surface Transportation Board ("STB") approved a merger between Union Pacific and Southern Pacific/SSW, subject to the imposition of the New York Dock labor protective provisions. On October 6, 1997, January 30, 1998 and June 4, 1998, pursuant to Article I, Section 4 of the New York Dock conditions, Union Pacific served notices upon the UTU of its intention to establish operational hubs in St. Louis, Kansas City and Salina, respectively. Extensive negotiations ensued for the purpose of implementing plans for those three hubs, including the seniority systems to be used in commingling Union Pacific and Southern Pacific/SSW workforces.

On July 29, and 30, 1998, Union Pacific and the UTU executed implementing agreements for the St. Louis and Kansas City Hubs, respectively. Those agreements provided that dovetailing would be effected by using each employee's current seniority date on the line which he or she was currently employed. Some existing prior rights were abrogated while others were retained. The St. Louis and Kansas City Hub implementing agreements were the subject of a ratification vote by the UTU local chairman whose members were affected. Union Pacific was advised in September, 1998, that the Kansas City and St. Louis Hub implementing agreements had been ratified by a majority vote of these Chairmen. However, one of the factual issues in the case involves a dispute by some of the Local Chairmen as to false representations made to obtain affirmative votes for ratification.

The consolidated seniority rosters for the St. Louis and Kansas City Hubs were constructed during a workshop held by Union Pacific and UTU the week of September 14 through September 18, 1998. At that time the issue of

seniority dates for the former Rock Island employees was raised again. Petitioners informed Union Pacific and UTU representatives that they did not agree to the provision that former Rock Island employees would be assigned their SSW seniority date of March 24, 1980. Petitioners indicated that they wanted their Rock Island hire dates to be used instead.

At the request of Petitioners' union representative, Associate General Chairman Don Hollis ("Hollis"), UTU President Little scheduled a September 23 – 24, 1998 meeting in Seattle, Washington, and another one at the UTU headquarters in Cleveland, Ohio on November 30, 1998-December 1, 1998 in order to discuss the issue of the seniority dates for former Rock Island employees. At the conclusion of those meetings the UTU once again took the position that the SSW hire dates would be used to dovetail former Rock Island employees.

Union Pacific began operating the St. Louis Hub on November 1, 1998. On November 2, 1998 Union Pacific served notice of its intent to establish a negotiated implementation agreement for the Salina Hub with terms similar to those of the Kansas City and St. Louis agreements. Another workshop to construct a consolidated seniority roster was conducted November 16-20, 1998.

Following the December 2, 1998 meeting, Hollis continued to express his members' dissatisfaction and objections to UTU leadership. On December 28, 1998 Hollis refused to sign the Salina Hub implementing agreement. Without his signature the Salina Hub implementing agreement could not be submitted for a ratification vote by the UTU Local Chairmen. Consequently, on January 5, 1999, Union Pacific invoked arbitration under Article I, Section 4, of the New York Dock conditions for the purpose of obtaining an agreement to implement the Salina Hub.

The New York Dock arbitration hearing on the Salina Hub was scheduled for February 23, 1999.

In the meantime, the named Petitioners filed a Motion for Contempt and for Temporary Restraining Order and Temporary and Permanent Injunction against Union Pacific and the UTU, contending that the Kansas City Hub implementing agreement and the tentative Salina Hub implementing agreement violated the orders and settlement in *Volkman*. Specifically, Petitioners alleged that they were members of the class in *Volkman*, and that the Kansas City and Salina Hub implement agreements eliminated their prior rights in contravention of the orders and settlement in *Volkman*.

A hearing on Petitioners' Motion for Temporary Restraining Order was held via telephone conference on January 14, 1999. After considering the parties' arguments, the court denied the Motion, finding that the Plaintiffs had, *inter alia*, failed to show that they were likely to prevail on their claim that the Salina and Kansas City Hub implementing agreements violated the *Volkman* orders and settlements. Additionally, the Court found that Petitioners "appear[ed] to have other remedies available to them, including arbitration." With the denial of Plaintiffs' Motion of Temporary Restraining Order, Union Pacific was free to, and did, implement the Kansas City Hub on January 16, 1999, as scheduled.

The New York Dock arbitration of the Salina Hub implementing agreement proceeded to hearing on February 23, 1999. In addition to the representatives of Union Pacific and the UTU, Petitioners' legal counsel appeared and participated, both in writing and orally, in the arbitration hearing. On March 25, 1999, the arbitrator issued his decision imposing the implementing agreement previously negotiated between Union Pacific and the UTU. In doing so,

the arbitrator concluded that the seniority provisions of the implementing agreement were not "unfair to former SSW or Rock Island [T]rainmen. Instead, the arbitrator found that the seniority provisions of the implementing agreement "represent[ed] a fair and equitable method of blending the rights of those employees with those of other Carrier affected employees." The arbitrator further found that the decisions and orders in *Volkman* have not "insulated the existing seniority rights of [Petitioners] against change through Article I, Section 4 of the New York Dock conditions."

On April 14, 1999, Petitioners Spaulding and Swonger, on behalf of themselves and all others similarly situated, filed a petition with the STB for review of the Salina arbitrator's award. Thereafter, on April 21, 1999, Plaintiffs filed a motion with the STB to stay the implementation of the Salina Hub. scheduled for May 1, 1999, pending resolution of their appeal. By decision served April 29, 1999, the STB denied Plaintiffs' request for stay of the Salina Hub implementation on the grounds that they had not met the STB's criteria for a stay. In particular, the STB stated that it was unlikely that they would even entertain the petition, let alone that Plaintiffs would prevail on their petition.

On May 1, 2000, the STB denied Plaintiffs' Petition to set aside the Salina arbitrators' award. That same day Union Pacific proceeded with the implementation of the Salina Hub on May 1, 1999.

On June 2, 1999 Petitioners filed the present action contending primarily that in accepting the Implementing Agreements for the Kansas City, St. Louis and Salina Hubs the UTU breached its duty of fair representation and Union Pacific colluded in that breach and interfered with Petitioners' contract rights. UTU filed its answer on July 12, 1999 and its Motion for Summary Judgment on December 23, 1999. Union Pacific filed its Answer on July 6, 1999 and

its Motion for Summary Judgment on December 27, 1999. The District Court granted summary judgment on all claims in favor of the Defendants on December 29, 2000. Appeal to the Tenth Circuit Court of Appeals was timely filed thereafter. The Tenth Circuit Court of Appeals issued its opinion on February 5, 2002 affirming the District Court.

The Court of Appeals made two decisions that are contrary to each other. In one part it held that the duty of fair representation claims of Petitioners' from the Salina Hub were within the exclusive jurisdiction of the STB, so that the District Court lacked subject matter jurisdiction over the claim. (App. p. 23). In this part of its ruling, the Court of Appeals affirmed the District Court's ruling granting summary judgment in favor of Union Pacific and UTU in regard to Petitioners' Salina Hub claim. As noted, the Court of Appeals found the District Court had properly held that Petitioners' duty of fair representation claims were within the exclusive jurisdiction of the STB, so that the District Court lacked subject matter jurisdiction over the claim. (App. p. 23).

Yet, the Court of Appeals apparently held to the contrary when it affirmed the District Court accepting jurisdiction of the duty of fair representation claims of the St. Louis and Kansas City Hubs but holding that those Petitioners' claims were barred by the statute of limitations. (App. p. 20). This inconsistent ruling is part of the basis for seeking Supreme Court jurisdiction.

In holding the Petitioners from the Kansas City and St. Louis Hubs were barred on their duty of fair representation claims, the Court of Appeals held those Petitioners were on notice of their claims by, at the latest, September 18, 1998, when the consolidated rosters were constructed for the Kansas City and St. Louis Hubs using the SSW seniority dates for dovetailing former Rock Island employees. (App. p.

10). According to the Court of Appeals that Petitioners' duty of fair representation claim as to those two hubs accrued prior to December 23, 1998 and thus more than six months before suit was filed. (App. p. 11).

Having found that the six month statute of limitations applicable to duty of fair representation claims under the Railway Labor Act had run prior to the time Petitioners filed this action, the Court of Appeals next considered and rejected Petitioners' argument that the statute was tolled due to equitable estoppel. The Court of Appeals held that once the seniority rosters for the Kansas City and St. Louis Hubs were constructed on September 18, 1998, Petitioners could not have reasonably believed they would be allowed to use their Rock Island hire dates. (App. p. 12). Accordingly, having determined that no factual issue as to the reasonableness of Petitioners' reliance could exist, the Court of Appeals approved of the District Court's granting of the Union Pacific and UTU motions for summary judgment on this issue. (App. p. 13).

The Court of Appeals next rejected Petitioners' argument that oral and written objections lodged by Hollis with Union Pacific and UTU officials constituted an internal union appeal which tolled the statute of limitations. The Court of Appeals determined that Hollis' "informal" objections and correspondence could not serve as a sufficiently formal appeal to toll the statute. (App. p. 16).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION WRONGLY HOLDS THAT THE SURFACE TRANSPORTATION BOARD HAS EXCLUSIVE JURISDICTION OF BREACH OF THE DUTY OF FAIR REPRESENTATION CLAIMS.

This issue involves the determination by the Court of Appeals that district courts do not have jurisdiction of breach of the duty of fair representation cases when the claims involve disputes that arise out of mergers that have been approved by the Surface Transportation Board. (App. p. 21). In so holding, the Court of Appeals has departed significantly from the decisions of this Court that district courts are vested with jurisdiction under the Railway Labor Act to determine issues surrounding a claim that a union has breached its duty of fair representation. See for example, *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048, (1953); *Humphrey v. Moore*, 375 U.S. 335, 342, 84 S.Ct. 363, 367, 11 L.Ed.2d 370 (1964); *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571, 96 S.Ct. 1048, 1059-60, 47 L.Ed.2d 231 (1976).

The Court of Appeals and the District Court held that the majority of Salina Hub Petitioners' allegations in this case necessarily depended upon issues within the scope of the dispute submitted to the New York Dock arbitrator. The Court of Appeals further stated that "whether a merger implementing agreement fairly blends the rights of plaintiffs with those of other affected employees and whether particular changes in seniority are necessary to effectuate a merger are matters within the exclusive jurisdiction of the arbitrator and [STB] (49 U.S.C. § 1132(a))." (App. p.). It subsequently concluded that the District Court had properly held that it lacked subject matter jurisdiction over Petitioners' duty of fair representation claims based upon UTU's asserted failure to negotiate an agreement which preserved Petitioners' seniority rights. (App. p. 23).

Petitioners contend that the actions of the union are separate and distinct from the issues decided by the arbitrator. For example, Petitioners contend the UTU failed

to develop and present to the arbitrator a unified position. That the UTU constitution so provides has previously been decided by the Court of Appeals for the Eighth Circuit in the case of *Beardsley v. CNW*, 850 F2d 1255 (8th cir. 1988). Yet, the arbitrator in this case was presented with two different views from the UTU, exactly the conduct condemned by the court in the *Beardsley* case. The arbitrator is not charged with the statutory authority to review union constitutions and procedures. Yet, the arbitrator's decision can be heavily affected by the fact that differing factions are presenting differing options for the merging of the seniority.

Petitioners do not seek in this case to substitute the arbitrator's judgment as to what was necessary to accomplish this merger. Petitioners do not contend in this litigation that seniority changes in the Salina hub were not necessary. That contention was made before the STB and is the subject of a separate proceeding for which Certiorari is requested and currently pending in this Court. See *Lyn Swonger, et al. v. Surface Transportation Board and The United States of America*, No. 01-939. Rather they contend that the question of what is ultimately found by the arbitrator to be "necessary" will depend upon the position urged by the union. If the union was wrong to have urged various options to the arbitrator, then the union has liability to those union members who have been injured by this wrongful conduct of the union. Whether the remedy be different seniority or merely compensatory damages goes only to the remedy, rather than to the gravamen, of Petitioners' cause of action. If the jury finds a violation of the duty of fair representation, the District Court will decide the appropriate remedy—but that is a different question than that of a determination that there is no jurisdiction in the District Court to hear this case. Indeed virtually all hybrid causes of action will involve application of law normally before the National Labor Relations Board, the National Railroad Adjustment Board, Public Law Boards, Arbitration Boards and the Surface

Transportation Board. If the Court of Appeals published decision is given effect, all breach of the duty of fair representation cases will now be required to go before the Surface Transportation Board because virtually all mergers are now required to be approved by the Surface Transportation Board.

The Court of Appeals acknowledged that in other settings the Supreme Court has determined an employee may go behind a final and binding arbitration award under a collective bargaining agreement and seek relief against his or her employer and union if the employee can demonstrate that a breach of the duty of fair representation seriously undermined the integrity of the arbitral process. *See United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56,61 (1981); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976). The Court of Appeals, however, then states "[w]e have applied the factors outlined in *Mitchell* to the situation before us, and we conclude that plaintiffs have failed to adduce facts that could be said to 'seriously undermine the integrity of the arbitral process.'"

Unfortunately, the Court of Appeals misapplied the *Mitchell* case as it involved a discussion as to what was the appropriate statute of limitations to apply, not subject matter jurisdiction nor even how evidence should be viewed to determine whether a claim can be processed in a district court alleging a breach of the duty of fair representation case. See *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56,61 (1981).

In spite of this, the Petitioners did offer that evidence at this summary judgment stage. They presented evidence that in regard to arbitration the UTU:

a. Argued for the position advocated by the International officials in contravention of the previous Board of Appeals decisions giving these Petitioners their rights;

b. Took this matter to arbitration without establishing a unified position as required by Article 90 of the UTU Constitution and as so noted in previous court decisions;

c. Refused to allow these Petitioners to take the matter up on appeal to get the unified position to be the position of these Petitioners;

d. Worked in unison with Union Pacific in contravention of Petitioners' rights;

e. Failed to advance to the arbitrator that the changes sought by Union Pacific were in violation of the pre-merger agreement the UTU reached with Union Pacific—all as noted and argued by the UTU in a previous arbitration called the Yost Arbitration;

f. Urged the arbitrator to make changes that are not allowed under the standard of the pre-merger agreement as being "necessary" for the obtaining of a public benefit;

g. Failed to provide an International Vice-President to represent and present the arguments of these Petitioners;

h. Chose with Union Pacific an arbitrator who had been known to have a substantial history of rulings siding with Union Pacific and other railroads in arbitration. This arbitrator also, at that time, was under charge of criminal conduct, and was so convicted within less than one month after rendering his ruling in the arbitration and has since been relieved of the ability to render anymore such arbitration by federal agencies.

To support these allegations, the Petitioners submitted the Declarations of James Spaulding and Lyn Swonger. Their Declarations were intended to and did create a record of material disputed issues of fact. Petitioners also submitted to the District Court a copy of Volume 1 of the Declaration of UTU General Counsel Clinton Miller submitted in the case of *Larry Hagerman et al v. United Transportation Union, et al,* Civil Number 98-WY-1384-WD, pending in The United States District Court for the District of Colorado which provided information regarding collusion between Union Pacific and UTU. Nevertheless, the Court of Appeals does not refer to these Declarations and does not acknowledge the existence of material facts being in dispute.

The Court of Appeals also noted that these Petitioners, having participated in the arbitration, "would seem" to have had the opportunity to question the UTU's handling of the arbitration process. (App. p. 23). The fact is, however, Petitioners did not have that opportunity. The arbitrator heard no evidence on, and did not determine, whether the UTU failed to follow its constitution, whether it failed to adopt a unified position in the arbitration or whether it conspired with Union Pacific to select a biased arbitrator as Petitioners have alleged. Petitioners filed this action in order to obtain a review of and relief from the improper actions of the UTU in the negotiation and arbitration process. The decision of the Court of Appeals bars that access to established Court process.

The Court of Appeals offers no analysis as to how it can be that the STB arbitrator can even know of, let alone allow, a union to violate its constitution and procedures in the course of those processes. Neither the District Court nor the Court of Appeals cite to any statutory law to state that exclusive jurisdiction lies in the Surface Transportation Board. No law delegates to the New York Dock arbitrator the jurisdictional authority to review the internal processes of

a union to determine whether the union is acting properly in the way it is going about the negotiation and arbitration of the implementing agreement. Neither does any law delegate to the New York Dock arbitrator or the STB the jurisdictional authority to review the internal processes of the union to determine whether the union is advocating its position on seniority in violation of it constitutional procedures and provisions. As a result of the above described actions of the UTU, Petitioners did not get a fair arbitration wherein their position was the only position advanced by the UTU to a fairly chosen and properly qualified neutral. The Court of Appeals was wrong to mix jurisdictional determinations with the question of evidence. But even then, these actions of the UTU seriously undermined the integrity of the arbitral process.

As such, the Court of Appeals has erred in several ways. First, it has held that a District Court does not have jurisdiction to review a claim of the breach of the duty of fair representation claims because it also involves deciding issues that would otherwise be determined by the Surface Transportation Board. (App. p. 22). If that be the law, much of the law surrounding hybrid actions and breach of the duty of fair representation claims has been seriously altered by this decision. Secondly, the Court of Appeals has held that elements that were used to apply a statute of limitations analysis are to be applied in deciding whether a claim exists for breach of the duty of fair representation. (App. p. 23). It thereby failed to follow established law as to the jurisdiction of district Courts to determine actions alleging breach of the duty of fair representation. Under both analyses the Court of Appeals has erred.

II. THE COURT OF APPEALS FAILED TO FOLLOW PREVIOUS DECISIONS AS TO EQUITABLE TOLLING BY DETERMINING UPON DISPUTED ISSUES OF MATERIAL FACTS THAT THE PETITIONERS' CLAIMS REGARDING THE ST. LOUIS AND KANSAS CITY HUBS ARE BARRED BY THE STATUTE OF LIMITATIONS.

As the Court of Appeals pointed out, the six month statute of limitations applicable to duty of representation claims normally begins to run "when an employee knows or in the exercise of reasonable diligence should have known or discovered the acts constituting the union's alleged violations." *Lucas v. Mountain States Telephone and Telegraph,* 909 F.2d 419, 420-21 (10th Cir. 1990); *McLinn v. Boeing co.,* 715 F. Supp. 1024, 1029 (D. Kan. 1989). In the opinion of that Court, the latest date at which Petitioners received sufficient notice to trigger the running of the statute was September 18, 1998, at which time the consolidated seniority rosters for the St. Louis and Kansas City Hubs were constructed. Accordingly the Court of Appeals determined that the statute of limitations had expired prior the time Petitioners filed their June 2, 1999 complaint in this action.

Petitioners, however, assert that the running of the statute was tolled and did not begin to run until after the December 2, 1998 meeting between Union Pacific and UTU at which Petitioners' objection to the September 18, 1998 seniority roster was again addressed. Petitioners claim this tolling occurred (1) as the result of equitable estoppel because UTU falsely represented to them that their seniority rights were still an open issue, and (2) they pursued internal union remedies through their Associate General Chairman Hollis.

The Court of Appeals rejected Petitioners' equitable estoppel argument on the basis that Petitioners' reliance upon the union's false statements could not have been reasonable

once the September 18, 1998 rosters were completed. It also rejected Petitioners' argument that Hollis' oral and written objections to union leadership constituted a formal appeal which tolled the statute of limitations. The Court of Appeals was incorrect on both counts.

1. Equitable Estoppel

When a union intentionally misrepresents facts so as to mislead a plaintiff relating to the running of a statute of limitations and thereby delay his bringing of an action, the statute of limitations is tolled due to the doctrine of equitable estoppel. *Tiberi v. Cigna Corporation,* 89 F.3d 1423, 1429 (10th Cir. 1996). A defendant may be equitably estopped from asserting the statute of limitations in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused the plaintiff to delay in bringing his lawsuit. *Cerbone v. International Ladies' Garment Workers Union,* 768 F.2d 45, 50 (2nd Cir. 1985); see also *Keating v. Carey,* 706 F.2d 377, 382 (2nd Cir. 1983). To invoke equitable estoppel, a plaintiff must show that: (1) the defendant made a definite misrepresentation of fact, and had reason to believe that the plaintiff would rely on it; and (2) the plaintiff reasonably relied on that misrepresentation to his detriment. See *Heckler v. Community Health Services,* 467 U.S. 51, 59 (1984); See also *Tiberi v. Cigna Corporation,* 89 F.3d 1423, 1429 (10th Cir. 1996).

Petitioners filed their sworn Declarations in which they stated that even after the September 18, 1998 seniority rosters for the St. Louis and Kansas City Hubs were constructed using their SSW hire dates, they were informed by Hollis that the seniority issue remained open and would be resolved at the December 2, 1998 meeting. Petitioners further stated in their Declarations that they relied upon those representations by Hollis.

Hollis was the Associate General Chairman who represented Petitioners who worked the Tucumcari line. While his assurances to the union members he represented may not have come to be, the question of whether their reliance upon those assurances was reasonable is one of material fact which cannot be decided upon a motion for summary judgment. Petitioners have had no opportunity to develop fully and present the facts which led them to rely upon the false representations made by union representative Hollis. Their Declarations, however, establish that an issue of material fact as to the reasonableness of their reliance exists. Furthermore, a reasonable jury could find that Petitioners acted reasonably in relying upon Hollis' representations. Accordingly, the Court of Appeals cannot properly determine that it was unreasonable for union members to rely upon the statements and assurances of their union representative. The Court of Appeals erred in affirming the District Court's granting of defendants' motion for summary judgment on this issue.

2. Internal Appeals

A statute of limitations is tolled while an employee attempts to exhaust internal union appeal procedures established by the union's constitution. See *Volkman v. United Transportation Union*, 73 F.3d 1047, 1055 (10th Cir. 1996). In the *Volkman* case, the UTU argued that the statute of limitations had run while the plaintiffs pursued the internal union remedies it, the UTU, required by the its Constitution. That was rejected by the District Court and the Appellate Court. The Tenth Circuit Court of Appeals noted that the UTU Constitution had strongly worded language that required such exhaustion. *Id.* at 1056. It held that the pursuit of internal remedies that turn out to be futile still provide a tolling of the statute of limitations. *Id.* at 1055-1056 and the cases there cited.

The Court of Appeals indicates in its decision that the actions of Associate General Chairman Hollis constituted an informal appeal as opposed to a formal appeal. Yet, the UTU constitution specifically provides for a General Chairman to process this appeal on behalf of his constituent members. Indeed, the specific language is:

" *Disputes arising under this Article which cannot be resolved by the General Committee or General Committees shall be referred to the International President.* The International President shall promptly assign an officer to assist the General Committee or General Committees involved in resolving the dispute. Failing to resolve the dispute the officer shall make a complete report and recommendation to the International President who, in turn, shall decide the dispute.

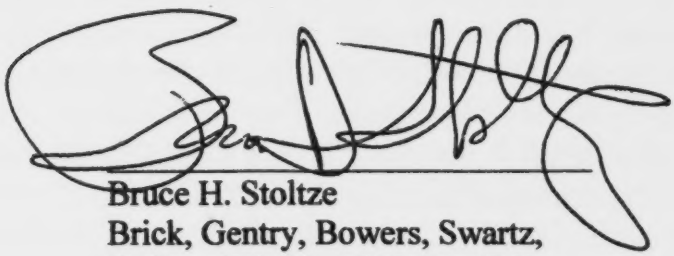
Any local or member of a local affected by action or decision of a Chairperson, Sub General Committee or General Committee, or by the decision of the International President with respect to this Article may appeal such action or decision to the Board of Appeals, provided such appeal is filed with the General Secretary and Treasurer *within ninety (90) days from the date of the action or decision.* The Chairperson, Sub General Committee, General Committee, or International President, as the case may be, shall be allowed thirty (30) days from the date the appeal is filed in which to reply to the appeal. The parties involved in an appeal shall exchange copies of the appeal and reply to the appeal." (emphasis supplied)

As this language demonstrates, there is nothing informal at all about a General Chairman processing an internal grievance appeal for his constituent members. Such processing is in fact the formal processing of an appeal as envisioned by the UTU Constitution. Accordingly, when Hollis processed the complaints of the St. Louis and Kansas City trainmen and obtained the November 30 – December 2,

1998 meeting, he was, in fact, processing the formal internal union process set forth by the UTU Constitution. The six month statute of limitations did not begin to run until after December 2, 1998. Petitioners' complaint was timely filed on June 2, 1999.

CONCLUSION

For the forgoing reasons Petitioners respectfully submit that the decisions of the District Court and Court of Appeals be reversed and request that a Writ of Certiorari be granted.



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United States Court of Appeals,
Tenth Circuit.

James SPAULDING, Lyn Swonger, Donald L. Inman, William N. Nance, and all others similarly situated, Plaintiffs-Appellants,
v.
UNITED TRANSPORTATION UNION and Union Pacific Railroad Company, Defendants-Appellees.

No. 01-3018.

Feb. 5, 2002.

Bruce H. Stoltze of Brick, Gentry, Bowers, Swartz, Stoltze, Schuling & Levis, P.C., Des Moines, IA, for Plaintiffs-Appellants.

John A. Edmond of Guerrieri, Edmond & Clayman, P.C., Washington, DC, for Defendant-Appellee United Transportation Union.

Brenda J. Council of Kutak Rock LLP, Omaha, NE, for Defendant-Appellee Union Pacific Railroad Company.

Before EBEL and PORFILIO, Circuit Judges, and SHADUR, District Judge. [FN*]

FN* The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

SHADUR, District Judge.

This appeal stems from the 1996 merger of the Union Pacific Railroad Company ("Union Pacific") with the Southern Pacific Rail Corporation and its subsidiaries (collectively "Southern Pacific"). Acting on behalf of themselves and all others similarly situated, James Spaulding ("Spaulding"), Lyn Swonger ("Swonger"), Donald Inman and William Nance have brought suit against their union, the United Transportation Union ("Union"), and Union Pacific. Plaintiffs (a collective term used here to embrace the entire putative class, not just the named plaintiffs) are former employees of Southern Pacific now employed by Union Pacific. They charge that Union breached its duty of fair representation in negotiating implementation agreements associated with the 1996 merger and that Union Pacific colluded in that breach and wrongfully interfered with plaintiffs' contractual rights.

After reviewing the parties' submissions on defendants' motions for summary judgment under Fed.R.Civ.P. ("Rule") 56, the district court granted those motions as to all claims. Plaintiffs now appeal, asserting two grounds for reversal:

1. Their claims as to the Kansas City and Saint Louis Hubs are not barred by the statute of limitations.
2. As to the Salinas Hub, the district court had, and we now have, subject matter jurisdiction to hear their claims.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Because we find no error in the rulings of the district court, we AFFIRM its order in all respects.

Standard of Review

We review the grant of summary judgment de novo, applying the same standard as did the district court (*Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1175 (10th Cir.2001)). Under Rule 56(c)

summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" (*Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1108 (10th Cir.2001)). For that purpose, familiar Rule 56 principles impose on defendants as movants the initial burden of establishing the lack of a genuine issue of material fact (*Celotex*, 477 U.S. at 322-23, 106 S.Ct. 2548). If that burden is met, plaintiffs as nonmovants must then come forward with "specific facts showing that there is a *genuine issue for trial* " (*Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting Rule 56(e) but adding emphasis)). On that score an issue is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party" (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Finally, in making our determination we, like the district court, are required to examine all of the evidence and draw all reasonable inferences in favor of plaintiffs as nonmovants (*Thiessen*, 267 F.3d at 1108).

Background

We begin by rehearsing the complex factual background, essential to a full understanding of the current dispute. This case has its factual beginnings in 1975 when the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") filed for bankruptcy. Plaintiffs were originally employed by Rock Island and later became employees of the St. Louis Southwestern Railway Company ("SSW") after it purchased a portion of Rock Island's trackage known as the Tucumcari Line in 1980. Currently plaintiffs are employees of Union Pacific as a result of its 1996 merger with Southern Pacific

and its subsidiary SSW. They are also members of Union, their federally recognized collective bargaining organization.

Seniority, Prior Rights and the New York Dock Conditions

At the core of this action are the "system seniority dates" that railroad employees use to bid on particular jobs and schedules. Normally the date on which an employee took his or her first compensated trip for his or her current employer is the seniority date. If two employees bid on the same job, the one with the earlier seniority date normally wins the bid. But if a less senior employee retains a "prior right" at a particular job location, he or she could prevail at that location over a more senior bidder who has more seniority with the employer but who lacks such a locational prior right.

Seniority dates and prior rights are a major source of contention in railroad mergers. To fulfill its statutory obligation of safeguarding affected workers while still facilitating implementation of beneficial mergers, the Surface Transportation Board ("Board") often imposes the *New York Dock* conditions as a condition of merger approval. [FN1] Those labor-protective provisions require carriers to provide affected employees with economic protections significant in both amount and duration.

FN1. Railroad mergers must be approved by the United States Department of Transportation, Surface Transportation Board (49 U.S.C. § § 11323-11326). Approval may be granted only if the combination is "consistent with the public interest," and Board is statutorily obligated to "provide a fair arrangement" for the protection of affected employees (*id.* § § 11324(c), 11326(a)). As for the *New York Dock* conditions, they are a comprehensive set of labor-protective conditions outlined by the Interstate

Commerce Commission ("ICC") in *New York Dock Ry. ControlBrooklyn E. Dist. Terminal*, 360 I.C.C. 60, 84-90 (1979), aff'd. sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir.1979). Until 1995 ICC was responsible for the rail-related functions, at which time they were assumed by Board (ICC Termination Act of 1995, Pub.L. No. 104-88, 109 Stat. 803 (1995)).

Prior Litigation

SSW's purchase of Rock Island's Tucumcari line in 1980 was pursuant to an agreement executed on March 4, 1980 ("March 4 Agreement") that provided for preferential hiring of the Rock Island employees by SSW and other carriers taking over Rock Island's trackage. To effectuate the March 4 Agreement, SSW and Union entered into an implementing agreement in 1982 ("1982 Implementing Agreement"), which provided among other things that former Rock Island employees hired by SSW before that agreement would receive a system seniority date of March 24, 1980, while the seniority dates of those hired after the 1982 Implementing Agreement would coincide with their actual dates of hire by SSW.

Federal litigation then ensued when a class of former Rock Island employees brought suit, alleging that the 1982 Implementing Agreement violated their preferential hiring rights and their rights to retain their Rock Island seniority dates as established in the March 4 Agreement. After protracted litigation and a court-approved settlement, *Volkman v. United Transp. Union*, 724 F.Supp. 1282 (D.Kan.1989), rev'd in part on other grounds, 73 F.3d 1047 (10th Cir.1996) established that no entitlement to retain Rock Island seniority dates derived from the March 4 Agreement. Instead March 24, 1980 was confirmed as the system seniority date for former Rock Island employees, including

plaintiffs, hired by SSW before the 1982 Implementing Agreement (724 F.Supp. at 1307, 1327-28). *Volkman* also established that the former Rock Island employees were entitled to prior rights at their SSW terminal of first hire (*id.* at 1335), but those prior rights would be subject to future modification through collective bargaining (*Volkman,* No. 83-6025-T (D.Kan. July 22, 1993)).

1996 Merger

In 1996 Board approved a merger between Union Pacific and Southern Pacific/SSW. One consequence was that the former Rock Island employees on the Tucumcari Line would again be displaced. To protect those and other affected workers, Board required that Union Pacific comply with the *New York Dock* conditions in implementing the merger. Pursuant to *New York Dock* conditions Art. I, § 4, Union Pacific gave notice to Union on October 6, 1997, January 30, 1998 and June 4, 1998 of its intention to establish three operational hubs: in the same order as those notification dates, Saint Louis, Missouri; Kansas City, Kansas; and Salina, Kansas. Extensive negotiations were undertaken, seeking to design mutually satisfactory implementation plans for the three hubs, including the seniority systems to be used for commingling the Union Pacific and Southern Pacific workforces. Those negotiations are the genesis of the present action.

Union's Const. Art. 90 requires that in effectuating a merger "General Committees of Adjustment shall arrange for a fair and equitable division of the work" and that "[p]rior seniority rights of employees to service on their former seniority district or territory shall be preserved to the extent possible." Union maintains that the integration of seniority lists in the event of a railroad merger is best accomplished by "dovetailing," and it sought to use that method in creating a consolidated seniority roster at each of the three hubs.

Dovetailing accomplishes consolidation by using the seniority date of each employee on the properties involved in the merger.

Throughout the extended negotiations Union held to the position that the former Rock Island employees would retain their prior rights on the Tucumcari line as to SSW employees, but that they would gain no prior rights with respect to Union Pacific employees. As for seniority, Union officials repeatedly asserted at a series of Local meetings and negotiation planning sessions that former Rock Island employees would be assigned their SSW seniority dates rather than their Rock Island dates for dovetailing purposes: That is, employees hired by SSW before the 1982 Implementing Agreement would receive a seniority date of March 24, 1980 rather than their earlier dates of hire by Rock Island. Plaintiffs' union representative, Associate General Chairman Don Hollis ("Hollis"), specifically inquired whether the Rock Island seniority date would be granted, and he was repeatedly told that it would not. Employees affected by that negative answer contend that the failure to make such assignment violated the provisions of *Volkman.*

Implementing Agreements

After that series of negotiations, Union and Union Pacific executed implementing agreements on July 29 and 30, 1998 for the St. Louis and Kansas City Hubs. Those agreements provided (1) that dovetailing would be effected by using each employee's "current seniority date" on the line on which he or she was currently employed and (2) that each employee would be assigned new prior rights in abrogation of all existing prior rights, although it was provided that the prior rights held by the former Rock Island employees on the Tucumcari line would be retained vis-a-vis other SSW employees. In accordance with Union's constitution, those agreements were put to a ratification vote and were approved

by a majority of all the local chairmen.

Union Pacific and affected Union representatives conducted a week-long workshop between September 14 and 18, 1998 to consolidate the seniority rosters for the two hubs. Once again the issue of seniority dates for the former Rock Island employees was raised, and once again it was made clear that those employees would be assigned their SSW seniority date of March 24, 1980. Plaintiffs told Union Pacific and Union representatives at that time that they did not agree to that provision.

Meanwhile plaintiffs had continued objecting to the proposal that their seniority dates after merger implementation would correspond to their dates of hire by SSW rather than by Rock Island. In August 1998 Hollis again questioned that position with Union officials. Union President Little scheduled a September 23-24, 1998 meeting in Seattle, Washington to discuss the issue-and Union's position was once again reconfirmed.

On November 1, 1998 Union Pacific began to operate the Saint Louis Hub under the terms of the implementing agreement. Then on November 2 Union Pacific served notice of its intent to establish a negotiated implementing agreement for the Salina Hub with terms similar to those of the Kansas City and Saint Louis agreements. Another workshop to construct a consolidated seniority roster was conducted from November 16-20, 1998.

On December 2, 1998 Union and Union Pacific held a meeting to address Hollis' continuing concerns as well as other implementation issues in Kansas City and Saint Louis. There it was again reiterated that the former Rock Island employees would not be permitted to use their original Rock Island seniority dates for the dovetailed rosters and that they would retain prior rights on the Tucumcari line vis-a-vis

other SSW employees. Despite the repeated rejection of his position, on December 28, 1998 Hollis refused to sign the Salina Implementing Agreement. Because Union's constitution requires the approval of all General Chairmen in affected jurisdictions before such agreements may be submitted for ratification, on January 5, 1999 Union Pacific invoked arbitration under *New York Dock* conditions Art. I, § 4 to procure an implementing agreement for the Salina Hub.

Next in the chronology, the Kansas City Hub was implemented on January 16, 1999. Arbitration as to the Salina Hub began shortly thereafter (on February 23, 1999). Despite plaintiffs' arguments that they were wrongfully being denied the right to use their Rock Island hire dates, on March 25, 1999 the arbitrator ruled to adopt the proposed Salina Implementing Agreement. Pursuant to the *New York Dock* conditions, Spaulding and Swonger appealed that decision to Board, and they moved to stay implementation of the Salina Hub pending resolution of the appeals process. Board denied that request for a stay, and the Salina Hub was implemented on May 1, 1999.

Plaintiffs had meanwhile written letters to various Union officials expressing their dissatisfaction with the negotiated seniority arrangement. On February 20, 1999 Spaulding sought to obtain a hearing before the Union Board of Appeals regarding plaintiffs' seniority rights by mailing a letter to Union's General Secretary and Treasurer. That request was denied by Union's President on March 22, 1999.

On June 2, 1999 plaintiffs filed the present action, contending primarily that by accepting the Implementing Agreements both Union and Union Pacific had abandoned the seniority rights to which plaintiffs were entitled. More specifically, Union is charged with breaching its duty of fair representation and Union Pacific is accused of colluding in the breach and interfering with plaintiffs' contractual rights.

As stated earlier, both defendants filed motions for summary judgment on all claims-motions that the district court granted on December 29, 2000 on the grounds that (1) claims regarding the Saint Louis and Kansas City Hubs were barred by the statute of limitations and (2) it lacked jurisdiction to hear claims regarding the Salina Hub.

While defendants' summary judgment motions were pending, Board declined plaintiffs' petition for review of the decision in the Salina arbitration on May 1, 2000. Plaintiffs sought judicial review of that decision in this court on June 16, 2000, and another panel of this court rejected their arguments in *Swonger v. Surface Transp. Bd.*, 265 F.3d 1135 (10th Cir.2001).

Kansas City and Saint Louis Hub Claims--Statute of Limitations

Plaintiffs concede that a six-month statute of limitations applies to their duty-of-fair-representation claim under the Railway Labor Act, as well as to any directly linked breach of contract claim against Union Pacific, pursuant to *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 155, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) and such *DelCostello* progeny as *Repstine v. Burlington N., Inc.*, 149 F.3d 1068, 1070-71 (10th Cir.1998). But they urge that such a limitations period was tolled by either (1) the doctrine of equitable estoppel or (2) their pursuit of internal union appeals. It will be recalled that plaintiffs filed this suit on June 2, 1999. Because we explain below that their claim accrued before December 2, 1998 and thus more than six months before they brought suit, their claim is time barred unless the statute of limitations was tolled.

[1][2] It has long been established that a duty-of-fair-representation claim accrues and "the limitation period begins to run when an employee 'knows or in the exercise of

reasonable diligence should have known or discovered the acts constituting the union's alleged violations' " *(Edwards v. Int'l Union, United Plant Guard Workers of Am.*, 46 F.3d 1047, 1053 (10th Cir.1995), quoting *Lucas v. Mountain States Tel. & Tel.*, 909 F.2d 419, 420-21 (10th Cir.1990) (per curiam)). As for plaintiffs' claims regarding negotiation of the Saint Louis and Kansas City Implementing Agreements, they were clearly aware of any alleged Union malfeasance by July 29 and 30, 1998, when the agreements expressly rejecting their position were executed. And as the district court correctly held, plaintiffs were on notice of their claims at the latest by September 18, 1998, when the consolidated seniority rosters were constructed with the use of their SSW seniority dates. Moreover, the agreements were ratified by a majority vote of the local chairmen in September 1998, [FN2] with even Hollis signing the agreements. There is thus no question that plaintiffs' duty-of-fair-representation claim as to those two hubs accrued well before December 2, 1998 and hence more than six months before suit was filed (*Rucker v. St. Louis SW Ry. Co.*, 917 F.2d 1233, 1238 (10th Cir.1990); *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 411 (5th Cir.1990); *Zapp v. United Transp. Union*, 879 F.2d 1439, 1441 (7th Cir.1989)).

> FN2. We have held that employees' ratification of an agreement bars claims that a union breached its duty of fair representation in negotiating the agreement (*Gullickson v. SW Airlines Pilots' Ass'n*, 87 F.3d 1176 (10th Cir.1996), adopting and republishing the district court's analysis originally reported at 931 F.Supp. 1534, 1541-44 (D.Utah 1995)).

Equitable Estoppel

[3][4][5] But plaintiffs waited nearly a year after the

implementing agreements were executed, and over eight months after the consolidated seniority roster was constructed, before they brought an action asserting their fair representation claim. They attempt to avert the bar of untimeliness by invoking the doctrine of equitable estoppel and arguing that Union's misrepresentations led them to delay filing. Equitable estoppel "prevent[s] a party from taking a legal position inconsistent with an earlier statement or action that places his adversary at a disadvantage" (*Penny v. Giuffrida*, 897 F.2d 1543, 1545 (10th Cir.1990)). There are four elements of a traditional estoppel claim (*id.* at 1545-46):

> (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his conduct will be acted upon or must so act that the party asserting the estoppel has the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting the estoppel must rely on the other party's conduct to his injury.

And mere reliance is not enough--such reliance on an adversary's misrepresentations "must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading" (*Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 59, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984); *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1417 (10th Cir.1984)).

[6] Plaintiffs argue that the conduct of Union officials misled them into believing that their seniority was still an open issue. They cite several statements that assertedly indicated either that their Rock Island seniority dates would be used or that the issue was unresolved. For example, at least three plaintiffs declare that Hollis told them they would be granted their Rock Island seniority date when the hub implementing agreements went into effect, thereby inducing them to vote to approve the implementing agreements. Indeed, one plaintiff contends the Kansas City plaintiffs were initially told that the Implementing Agreements allowed them to use their Rock

Island dates. But even when all of those claims are credited, they lose effect because all of the statements were made *before* the consolidated seniority rosters were constructed. Once the rosters were put together by using SSW dates, plaintiffs could not reasonably believe the agreements allowed them to use their Rock Island dates. So those claimed representations cannot toll the limitations period.

[7] Plaintiffs further assert that even after roster construction Hollis continued to represent that they would receive their Rock Island seniority dates. They claim they were told that the seniority issue would be resolved at the December 2, 1998 meeting in Cleveland. They also contend they were told that Union would use the arbitration regarding the Salina Hub "as a guise" to address Saint Louis and Kansas City seniority.

Even if it were assumed that those remarks amounted to misrepresentation and that Union officials had reason to believe plaintiffs would rely on the statements to delay filing their claim, the district court correctly found that plaintiffs have failed to demonstrate such reliance was *reasonable.* Indeed, it was patently *unreasonable* for plaintiffs to rely on Hollis' repeated assurances that their seniority was still an open issue. They should have known they could not count on any suggestion by Hollis that he could singlehandedly alter previously executed Implementing Agreements (indeed, signed by Hollis himself as well as all other General Chairmen) and that Union had not settled on its position-surely that scenario could not justify their sitting back without taking the action required to advance their claim.

Nor did Hollis' later reversal of his own support for the Implementing Agreements in his October 3, 1998 letter to a Union Pacific vice-president at all indicate that *Union's* position had changed. To the contrary, Union unwaveringly held the same position it had held all along. In sum, any

claimed reliance on Hollis' "lone wolf" promises made in defiance of Union's consistent rejection of his position-a rejection of which plaintiffs were admittedly aware-was simply not reasonable.

As for plaintiffs' awareness, Swonger and Spaulding have both declared that at the December 2, 1998 meeting Hollis "was not successful in dissuading the UTU and the UP from following the course they had previously set." That of course is an admission to having known that Union's position on the issue was settled *before* the December 2 meeting. As the district court aptly noted:

> [P]laintiffs may have reasonably hoped that Hollis could convince the union to change its previous position, but they could not reasonably believe the union had not taken a position.

[8] As for plaintiffs' profoundly unspecific assertion that Union itself somehow represented that the December 2 meeting would resolve the seniority issue, even with the benefit of favorable inferences--which, we repeat, must be reasonable-it cannot be said that Union knew the seniority issue was conclusively resolved but nevertheless misled plaintiffs as to the status of the issue. Because plaintiffs have presented no evidence from which a reasonable jury could find that reliance on that purported Union representation was reasonable, summary judgment is appropriate (*Anderson*, 477 U.S. at 248, 106 S.Ct. 2505; *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 208 (10th Cir.1997)).

As plaintiffs would have it, Union--at some unspecified time and through some unspecified person--assertedly made a statement that seniority would be resolved at the December 2 meeting. It was to negate the use of just such amorphous claims to avert summary judgment that the Supreme Court said in the first of its 1986 trilogy of cases construing Rule 56, *Matsushita*, 475 U.S. at 586, 106 S.Ct. 1348:

> Second, the issue of fact must be "genuine." Fed. Rules Civ. Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.

In the face of the overwhelming abundance and consistency of Union statements and conduct confirming that the issue was already conclusively resolved to plaintiffs' detriment, no tenable support justifies plaintiffs' delay in filing a duty-of-fair-representation claim.

[9] Unwilling to acknowledge the compelling force of the wealth of evidence refuting their contention, plaintiffs urge that the district court improperly resolved disputed issues of material fact as to what representations were made and whether plaintiffs' reliance was reasonable. That simply mischaracterizes the district court's reasoning. Instead of resolving disputed factual issues, it assumed all of plaintiffs' allegations to be true and found that their uncontroverted knowledge that the executed Implementing Agreements rejected the use of their Rock Island seniority dates rendered reliance on any contrary representations unreasonable. Without reasonable reliance there can be no estoppel (*Emery Mining*, 744 F.2d at 1417). We review the district court's refusal to apply the doctrine of equitable estoppel for abuse of discretion (*Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 861 (10th Cir.1996)), and we find the district court's ruling an indisputably proper exercise of its sound discretion.

Internal Appeals

[10][11] Caselaw here (as elsewhere) teaches that pursuing internal union appeals can also toll the statute of limitations even if the appeals ultimately prove futile (*Volkman*, 73 F.3d at 1055-56). But plaintiffs' fatal difficulty in that respect is that no such appeal was taken in accordance with Union's constitution.

Union's Const. Art. 90 provides in relevant part:

> Any local or member of a local affected by action or decision of a Chairperson, Sub General Committee or General Committee, or by the decision of the International President with respect to this Article may appeal such action or decision to the Board of Appeals, provided such appeal is filed with the General Secretary and Treasurer within ninety (90) days from the date of the action or decision. The Chairperson, Sub General Committee, General Committee, or International President, as the case may be, shall be allowed thirty (30) days from the date the appeal is filed in which to reply to the appeal. The parties involved in an appeal shall exchange copies of the appeal and reply to the appeal.

It is uncontroverted that Hollis failed to file a formal appeal with Union's General Secretary and Treasurer as Article 90 requires. And his informal objections and correspondence with Union and Union Pacific officials could not serve as proxy for the prescribed dispute resolution procedures (*Cohen v. Flushing Hosp. & Med. Ctr.*, 68 F.3d 64, 68 (2d Cir.1995); *Pantoja v. Holland Motor Express, Inc.*, 965 F.2d 323, 328-29 (7th Cir.1992)). As the Seventh Circuit has prudently noted (quoting *Pantoja* in part), if the rule were otherwise plaintiffs could toll the statute indefinitely by making repeated informal requests to different union officials for further review (*Christiansen v. APV Crepaco, Inc.*, 178 F.3d 910, 916 (7th Cir.1999)).

In an effort to overcome that fatal defect, plaintiffs argue on appeal that a General Chairman talking to and corresponding with union leaders actually constitutes an alternate method of pursuing a formal appeal under Union's constitution. They point to this earlier language in Const. Art. 90:

> Disputes arising under this Article which cannot be resolved by the General Committee or General Committees shall be referred to the International President. The

> International President shall promptly assign an officer to assist the General Committee or General Committees involved in resolving the dispute. Failing to resolve the dispute the officer shall make a complete report and recommendation to the International President who, in turn, shall decide the dispute.

But that position is equally flawed, for it is plain that the quoted pre- appeal procedure was not involved in the situation at issue. It will be remembered that Hollis' further effort sought instead to obtain reconsideration of a decision that had already been reached with his concurrence--a decision embodied in the fully executed St. Louis and Kansas City Hub Implementing Agreements (which Hollis, like all other affected General Chairmen, had signed).

What actually transpired as the result of Hollis' continued expression of dissatisfaction with the seniority arrangement after the Implementing Agreements were signed was that Union President Little held a meeting in Seattle, Washington on September 23-24, 1998. And it was there reiterated to the participants, including the affected General Chairmen, that Rock Island seniority dates would not be granted. That too preceded plaintiffs' lawsuit by more than six months, so plaintiffs can gain nothing by seeking to pursue that alternate route to avoid the limitations bar.

[12] Finally, Hollis' post-September requests for further review did not serve to toll the statute. Once a union has clearly responded negatively to an appeal, no continuing requests for review suffice to toll the statute (*Stevens v. NW Ind. Dist. Council, United Bhd. of Carpenters*, 20 F.3d 720, 730 (7th Cir.1994); *Fox v. Parker Hannifin Corp.*, 914 F.2d 795, 804 (6th Cir.1990)).

[13] We also agree with the district court that plaintiffs' own belated attempts to obtain a formal Union appeal did not toll the statute of limitations so as to make their duty-of-fair-

representation claims timely. Spaulding filed the first formal appeal in accordance with Union's constitution on February 20, 1999, and it was rejected by Union's president on March 22, 1999. Even if the statute were viewed as having been tolled during the month in which that appeal was pending, plaintiffs still fail to satisfy the six- month limitations period because their claim was not filed until at least eight months after it accrued.

[14] That also dooms the other branch of plaintiffs' hybrid claim, asserted against Union Pacific. Ever since *DelCostello*, 462 U.S. at 165, 103 S.Ct. 2281 it has been clear that a viable duty-of-fair-representation claim against an employee's union is the jurisdictional predicate for a correlative claim against the employer, so that the interdependent nature of the claims triggers the same six-month limitations period. We have consistently applied the same principle--see, e.g., *Repstine*, 149 F.3d at 1071.

Summary

We therefore AFFIRM the district court's holding that plaintiffs' claims regarding the Saint Louis and Kansas City Hubs are barred against both Union and Union Pacific by the statute of limitations. That makes it unnecessary to address the district court's alternative holding that plaintiffs' duty of fair representation claims as to the Saint Louis and Kansas City Hubs were beyond the court's jurisdiction because they were subject to mandatory arbitration under *New York Dock* conditions Art. I, § 11.

Salina Hub Claims--Lack of Subject Matter Jurisdiction

We now review the bidding on plaintiffs' remaining claim. After Hollis had torpedoed approval of the Salina Implementing Agreement by refusing to sign, Union Pacific invoked arbitration under *New York Dock*--and plaintiffs

participated through counsel in both a written position statement and at oral argument. On March 25, 1999 the arbitrator ruled to adopt the proposed Salina Implementing Agreement. Next plaintiffs appealed to Board pursuant to the *New York Dock* conditions, but Board declined to review the arbitrator's decision. And finally plaintiffs then sought judicial review, but their claims were rejected by this court in *Swonger*, 265 F.3d at 1135.

[15][16] As to the Salina Hub, the district court below held that plaintiffs' duty-of-fair-representation claim was within the exclusive jurisdiction of Board, so that the court was without subject matter jurisdiction over the claim. We review de novo such a dismissal of a claim based on lack of subject matter jurisdiction (*Robinson v. Union Pac. R.R.*, 245 F.3d 1188, 1191 (10th Cir.2001)).

[17] Both statute and caselaw confirm Board's exclusive authority to approve railroad mergers and consolidations (49 U.S.C. § 11321(a); *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 119-20, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991)). That authority extends to abrogating rights and obligations (including the modification of seniority rights) under existing collective bargaining agreements to the extent necessary to realize the public transportation benefits of a merger (*Norfolk & W., id.* at 127-28, 132-33, 111 S.Ct. 1156; *Swonger*, 265 F.3d at 1140-42). But in so doing, Board is bound to safeguard the rights of adversely affected employees (49 U.S.C. § § 11324(b)(4), 11326; *Norfolk & W.*, 499 U.S. at 120, 111 S.Ct. 1156).

As stated earlier, Board satisfied that obligation in the 1996 merger by conditioning its approval on the parties' observance of the *New York Dock* labor-protective conditions, which outline procedures for negotiation and binding arbitration to resolve conflicts that arise in merger implementations (*New York Dock*, 360 I.C.C. at 77-78).

Board has the exclusive authority to review those arbitration awards, subject only to review in a Court of Appeals (28 U.S.C. § § 2321(a), 2342(5)).

Here it was the district court's view that although a duty-of-fair- representation claim may sometimes be separate and distinct from the issues involved in an arbitration, the "vast majority" of plaintiffs' allegations were necessarily dependent upon issues squarely within the scope of the dispute presented to the *New York Dock* arbitrator. We agree, for the gravamen of the allegations in the complaint relates to Union's failure to negotiate an Implementing Agreement that preserved plaintiffs' seniority rights-see, e.g., Complaint ¶ ¶ 23 and 27(f):

> The Implementing Agreements at the St. Louis Hub, the Kansas City Hub and Expanded Salina Hub failed to provide for these Plaintiffs and class members to maintain their prior right and other seniority and/or the equivalent of their prior and other seniority and equity rights vis-a-vis other members of the UTU, all in violation of their rights under the law, the pre-merger agreement, the constitution of the UTU and the Orders and Settlement Agreement of the previous litigation.
>
> * * * * * *
>
> [Union] either did not utilize the right under the contract with [Union Pacific] for it to establish the seniority and/or it abused or unfairly used said right to abridge the rights of these Plaintiffs and class members.

As we have indicated, whether a merger implementing agreement fairly blends the rights of plaintiffs with those of other affected employees and whether particular changes in seniority are necessary to effectuate a merger are matters within the exclusive jurisdiction of the arbitrator and Board (49 U.S.C. § 11321(a)). During the Salina Hub arbitration hearing, plaintiffs (who were allowed to participate through

counsel) had argued in a written submission and orally that the agreement was not fair and the seniority changes were not necessary--that they had been wrongfully denied the right to use their Rock Island hire dates in constructing consolidated seniority rosters. After a full hearing and consideration the arbitrator decided against them, ruling that the Salina Hub represents "an obvious public transportation benefit and that considerations of efficiency of that operation warrant the modification and elimination of existing seniority rights as set forth in the proposed implementing agreement" and that the proposed agreement "represent[ed] a fair and equitable method of blending the rights of those employees with those of other Carrier affected employees." Because the *Volkman* orders specifically provided that the seniority rights of the former Rock Island employees were subject to modification through future collective bargaining, the arbitrator rejected plaintiffs' claim that the proposed Salina agreement contradicted those orders.

Plaintiffs presented their fairness and necessity arguments again in their appeal to Board and once again before this court in *Swonger*, 265 F.3d at 1141-43. Those appeals, resolved against plaintiffs, were their exclusive avenues of relief--they may not attack the arbitrator's ruling collaterally by seeking recourse in this proceeding (28 U.S.C. § § 2321(a), 2342(5); *United Transp. Union v. Norfolk & W. Ry. Co.*, 822 F.2d 1114, 1120-21 (D.C.Cir.1987)). Because 28 U.S.C. § 2342(5) expressly vests exclusive jurisdiction to review Board determinations in Courts of Appeals, the district court correctly held that it lacked subject matter jurisdiction over plaintiffs' duty-of-fair-representation claim based on Union's asserted failure to negotiate an agreement that preserved their seniority rights (*Ry Labor Executives' Ass'n v. S. Pac. Transp. Co.*, 7 F.3d 902, 906-07 (9th Cir.1993); *Bhd. of Ry. Carmen v. CSX Transp., Inc.*, 855 F.2d 745, 748-49 (11th Cir.1988)(per curiam)).

This case is unlike the usual duty-of-fair-representation challenge to a union's handling of an arbitration in that here the employees were also participants in the arbitration and thus, it would seem, would have had the opportunity to question the union's handling in the arbitration proceeding itself and in the direct review of the arbitration award to and including *Swonger*. But we need not decide whether that opportunity existed (something that could preclude a collateral attack here), for as *United Parcel Serv. v. Mitchell*, 451 U.S. 56, 61, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981), quoting *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976), teaches:

> As *Hines* makes clear, an employee may go behind a final and binding award under a collective-bargaining agreement and seek relief against his employer and union only when he demonstrates that his union's breach of its duty "seriously undermine[d] the integrity of the arbitral process."

Accord, *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1242 (10th Cir.1998).

We have applied the factors outlined in *Mitchell* to the situation before us, and we conclude that plaintiffs have failed to adduce facts that could be said to "seriously undermine[ ] the integrity of the arbitral process." Their substantively deficient allegations as to Union's asserted violation of its constitution, its asserted failure to advance particular arguments, its claimed selection of a biased administrator and its purported failure to adopt a unified position fail to meet that test. And that is fatal to plaintiffs' claim against both Union and Union Pacific.

Conclusion

As we have shown at considerable length, both defendants have carried their burden of showing the absence of any genuine issue of material (that is, outcome-determinative)

fact. For their part, plaintiffs have failed to come forward with evidence establishing a genuine issue for trial. Because the district court correctly applied the substantive law, we AFFIRM the district court's order granting both defendants summary judgment and dismissing this action. Finally, this resolution of the substantive issues in the case moots plaintiffs' argument that the district court erred in determining not to certify this matter as a class action.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JAMES SPAULDING, LYN SWONGER, DONALD L. INMAN, WILLIAM NANCE, and all others similarly situated, Plaintiffs, v. UNITED TRANSPORTATION UNION and UNION PACIFIC RAILROAD COMPANY, Defendants.	No. 99-12CB-WEB

Memorandum and Order

This litigation is a by-product of the 1996 merger of the Union Pacific Railroad and the Southern Pacific Rail Corporation and its subsidiaries. The plaintiffs and the purported class members, who are certain former employees of the Southern Pacific now employed by Union Pacific, content that in various agreements negotiated after the merger, the UTU failed to preserve the seniority and "prior rights" that plaintiffs had under pre-merger collective bargaining agreements. The complaint alleges that the United Transportation Union (UTU) breached a duty of fair representation owed to the plaintiffs, and that the Union Pacific joined in the breach and wrongfully interfered with plaintiffs' contractual rights. The matter is now before the

court on the defendants' motions for summary judgment. The court finds that oral argument would not assist in deciding the issues presented.

I. Facts

In keeping with the standards governing summary judgment, any facts in the parties' briefs not properly supported by the record have been deleted from the following statement of facts. Any matters on which the record discloses a genuine dispute of fact have been construed in plaintiff's favor for purposes of determining whether the defendants are entitled to judgment as a matter of law.

Plaintiffs and the purported class members were employed as brakeman, conductors and switchmen, first for the Chicago, Rock Island and Pacific Railroad ("Rock Island"), and then for the St. Louis Southwestern Railroad "SSW") after its purchase of a portion of Rock Island's rail network. They are currently employed by the defendant Union Pacific, which merged with the Southern Pacific and its subsidiary, the SSW, in 1996. Plaintiffs and purported class members are based at either the St. Louis, Kansas City, or Salina Hubs.

Defendant UTU is an unincorporated labor association that, pursuant to the Railway Labor Act, 45 U.S.C. §§ 151-88 ("RLA"), represents the crafts or classes of brakeman, conductors, switchmen and yard foremen for collective bargaining purposes. The UTU consists of three organization levels: (1) the International, headquartered in Cleveland, Ohio; (2) General Committees of Adjustment, which act as intermediate bodies with primary collective bargaining responsibility on specific railroads or geographic portions of specific railroads; and (3) Locals, organized in a specific geographic area. Charles Little currently serves as the International President of the UTU.

Defendant Union Pacific is a rail carrier and a corporation headquartered in Omaha, Nebraska. Union Pacific employees the plaintiffs and putative class members

under the terms of collective bargaining agreements negotiated with the UTU.

Seniority Rights in the Railroad Industry.

In the railroad industry, employees bid on particular jobs and schedules using their "system seniority dates." For an employee first starting railroad employment, the system seniority date would usually be based on date the employee took his or her first compensated trip for their employer.

Generally, if two employees within the same seniority district bid on the same assignment, the employee who holds the "senior" seniority date will win the bid. If, however, a less senior employee retains a "prior right" in a location, he or she could win the bid-upon assignment over an employee with greater seniority who does not have a prior right at that location.

In prior litigation involving the plaintiffs, Volkman v. UTU, 724 F.Supp. 1282, 1288 (D. Kan. 1989), the court described "prior rights" as follows:

> A designation of "prior rights" ... gives the employee First preference to all jobs in that place in the seniority order for employees granted prior rights at that location. An employee who did not have prior rights at a location came behind all prior rights employees, regardless of his seniority date. For example, if three employees with seniority dates of 1976, 1977 and 1978 bid for a job, the employee with the 1978 date could win the job if he had prior rights at that location or to that line.

Prior Litigation.

The plaintiffs are former employees of the Rock Island who worked on that carrier's "Tucumcari Line." The SSW purchased the Tucumcari Line from the Rock Island in 1980, after the Rock Island declared bankruptcy.

SSW and other carriers that purchased portions of the Rock Island negotiated an agreement with the UTU and other railroad unions, executed on March 4, 1980 (the "March 4 Agreement"). Pursuant to the March 4 Agreement, former

Rock Island employees were offered preferential hiring by the SSW, however, the former Rock Island employees were considered to have severed their employment relationship with the Rock Island. The March 4 Agreement did not require the SSW to recognize such employees' Rock Island seniority dates. See Volkman, 724 F.Supp. at1328.

The UTU and SSW signed an Implementing Agreement on February 23, 1982 (the "1982 Implementing Agreement") to give specific application to some of the terms of the March 4 Agreement. Among other provisions, the 1982 Implementing Agreement established seniority dates for former Rock Island employees hired by SSW: those hired before the 1982 Implementing Agreement were given a system seniority date of March 24, 1980, and those hired after were assigned their actual date of hire by the SSW.

In the Volkman litigation, the district court found that the 1982 Implementing Agreement adopted by SSW and UTU breached the plaintiffs' rights under the March 4 Agreement in several respects, including by improperly eliminating preferential hiring provisions for Rock Island brakemen and by filling certain vacancies on the Tucumcari Line with furloughed SSW employees instead of Rock Island brakeman. But the district court rejected plaintiffs' claims that the March 4 Agreement provided that they were entitled to retain their Rock Island seniority dates. The court stated that "[t]he lack of carryover [seniority] in any implementing agreement is not a violation of the March 4, agreement." Volkman, 724 F.Supp. at1328. The court said that Rock Island employees were to retain Rock Island seniority only "until hired by SSW." Id. Former Rock Island employees hired by SSW before the 1982 Implementing Agreement were given a system seniority date of March 24, 1980,and those hired after were assigned their respective dates of hire.

The district court in Volkman held that former Rock Island employees working as brakemen, conductors and engineers at SSW on the Tucumcari Line were entitled to

prior rights at their terminals to permit them to bid ahead of other SSW employees for positions on the Tucumcari Line.

Following the entry of the Volkman ruling in 1989, litigation continued involving other classes of former Rock Island employees covered by the March 4 Agreement. The district court entered a final judgment regarding most of this continuing litigation on July 21, 1993. Among other conclusions, the court held that a class of plaintiffs known as the "1993 hires" were entitled to prior rights of the same status as other former Rock Island employees working for SSW. These rights, the court noted, were potentially limited in duration because they were "subject to modification through collective bargaining the same as are prior rights granted under existing labor contract been the defendants SSW and UTU." UTU Exh. 1 at 6. In addition, the court held that any disputes regarding prior rights and seniority "shall be handled by the SSW and UTU through the grievance and arbitration procedures mandated by the Railway Labor Act and/or the Interstate Commerce Act." Id.

The New York Dock Conditions

In a decision issued August 12, 1996, the Surface Transportation Board ("STB")[1] authorized Union Pacific, Southern Pacific, and their subsidiaries, to merge their operations. Union Pacific Corp., et al. and Southern Pacific Rail Corp., etal., STB Finance Docket 37260, Decision No. 44, 1996 STB LEXIS 220 (Aug. 12, 1996). The STB conditioned its approval upon the imposition of labor protective provisions known as the New York Dock conditions.

The New York Dock conditions permit the merged carriers to do what otherwise would be prohibited by existing collective bargaining agreements, namely, to transfer work between them, provided that the employees who are

[1] As of January 1, 1996, the Surface Transportation Board succeeded the Interstate Commerce Commission and had regulatory authority over rail mergers. See 49 U.S.C. §10101 et seq.

adversely affected by such a transfer of work receive specific economic protections. See New York Dock Railway --- Control –Brooklyn Eastern Dist. Terminal, 360 ICC 60, 84-90 (1979).

Specifically, under the New York Dock conditions, plaintiffs will be compensated by a monthly "displacement allowance" for any loss in pay that results from the merger, for a period of up to six years. In addition, if plaintiffs were to lose their employment as a result of the merger, they would be entitled to receive a monthly "dismissal allowance" equivalent to the compensation, including overtime, received prior to dismissal, for a protective period of up to six years. Further, under Article I, Section 9, employees who are required to transfer as a result of the merger are reimbursed for all moving expenses and losses that result from home removal.

The New York Dock conditions also set forth procedures for resolving disputes that arise over the implementation of a subject transaction. Article I, Section 4 provides a schedule for the negotiation and, if necessary, final and binding arbitration of an Implementing Agreement to govern any rearrangement of forces and the application of the protective provisions. Article I, Section 11 provides for arbitration of any dispute that arises over the interpretation or application of an Implementing Agreement or the New York Dock conditions themselves.

The STB has exclusive authority to review the New York Dock arbitrator's decision. Under this review, the STB determines whether the arbitrator's decision correctly "interpret[s] our labor protective provisions." Chicago & North Western Transp. Co – Abandonment, 3 I.C.C. 2d 729, 1987 ICC LEXIS 343, *18 ("Lace Curtain"), aff'd subnom. Int'l Broth. Of Elec Workers v. I.C.C., 826 F2d 330 (D.C. Cir. 1988). The STB also reviews whether decisions are "procedurally fair and impartial." Lace Curtain, 1987 ICC LEXIS at *16. Under that standard, the STB may vacate arbitral awards where "there is egregious error, the award fails to draw its essence from [the labor conditions], or the

arbitrator exceeds the specific contract limits on his authority." See United Transp. Union v. ICC, 43 F.3d 697, 699 (D.C. Cir. 1995). Appeal from the STB's decision is directly to a U.S. Court of Appeals. 28 U.S.C. §§ 2321, 2342(5).

The Current Dispute

Pursuant to Article I, Section 4 of the New York Dock conditions, on October 6, 1997 and January 30, 1998,Union Pacific provided notice to the UTU of its intent to establish transportation hubs at St. Louis and Kansas City, Missouri, respectively. By letter dated June 4, 1998, Union Pacific gave notice regarding the creation of a hub at Salina, Kansas. The parties then engaged negotiations to reach Implementing Agreements for all three hubs.

Article 90 of the UTU's Constitution requires that in the even of a merger, "General Committees of Adjustment shall arrange for a fair and equitable division of the work." It further provides, "Prior Seniority rights of employees to service on their former seniority district or territory shall be preserved to the extent possible.

The UTU contends that the simplest manner to integrate seniority lists of merged carriers is by a straight dovetailed seniority roster, based upon each employee's hire on the property in which he was last employed. This is the manner in which several of the hub seniority integrations have been addressed in the UP-SP merger. At the same time, in negotiations with the Union Pacific over the merger implementing agreements, UTU took the position that since the former Rock Island employees had prior rights on the Tucumcari line with respect to the other SSW employees, no such SSW employees should be permitted to "run around" the former Rock Island employees in seniority on that line.[2]

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[2] UTU assets that it adopted this view as the union's unified position pursuant to Article 90 of its Constitution. Citing Declaration of Richard E. Karstetter, ¶ 11. Plaintiffs assert that the UTU did not obtain a unified position relating to the Rock Island employees' use of prior rights against UP employees. Citing Declaration of James Spaulding, ¶ 16.

In other words, the UTU's position was that, after the merger with the UP, the SSW employees on the Tucumcari Line should continue in the identical ranking that they previously held among themselves. [3]

During the course of negotiations between Union Pacific and the UTU over the merger implementing agreements, the involved UTU General Chairman attended meetings held by the affected UTU Locals, to inform the membership of the status of the talks and to answer questions. A local meetings held in Wichita and Coffeyville, Kansas, UTU Associate General Chairman Don L. Hollis, who represented former SSW employees, specifically inquired as to whether former Rock Island employees would be granted their Rock Island seniority dates for the purposes of integrating seniority lists as a result of the merger. Each time this question was raised, the other UTU International officials present advised that the former Rock Island employees would be integrated into the merged list using their SSW seniority dates, and not their Rock Island dates. In addition, during negotiation planning meetings, it was made clear to local chairman who were present that current system seniority dates – not former Rock Island seniority dates – would be used in dovetailing the Union Pacific and Southern Pacific rosters. At these meetings, the former Rock Island employees or their representatives made clear that they did not agree with the UTU's position. Among other things, they contended that the UTU's proposals on seniority were in violation of the court's rulings in the Volkman litigation.

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[3] Plaintiffs vigorously object to this assertion, pointing out that before the UP-SP merger they had prior rights on the Tucumcari Line with respect to everyone, not just with respect to other SSW employees. The court does not mean to suggest otherwise in the statement of facts above. The point here is that UTU took the position that plaintiffs' superior position to other SSW employees should be preserved in the UP-SP implementing agreements, but that UTU did not take the position that the plaintiffs would have prior rights with respect to Union Pacific employees.

The Kansas City and the St. Louis Hub Implementing Agreements provided that employees from the Union Pacific and Southern Pacific would be dovetailed into a single roster using the employee's "current seniority date" on the line on which they were employed, i.e., either the SSW or Union Pacific. The Agreements also provided that each employee assigned to the consolidated roster would be afforded prior rights in one of the zones created in their respective hub and that "[a]ll pre-exising prior rights ... are of no further force or effect and the provisions of this article shall prevail in lieu of thereof."

These Implementing Agreements were put to a ratification vote by the affected Local Chairman. By letters dated September 11, 1998, International President Little announced that a majority of the Local Chairman had voted to accept the Agreements.

Union Pacific held a week-long workshop, from September 14 through September 18, 1998, with affected UTU General and Local Chairmen to construct consolidated seniority rosters from the St. Louis and Kansas City Hubs. At these meetings, UTU Local Chairmen contacted individual employees in the St. Louis and Kansas City Hubs by telephone to notify them that the Agreements were to go into effect on November 1, 1998 and January 16, 1999, respectively, and to ask them whether they wised to remain in the hubs where they were currently working. Also, at these meetings, the issue of the former Rock Island employees' seniority dates was again discussed, and it was made clear that the UTU and the Union Pacific were going to insist that the former Rock Island employees were to use their March 24, 1980 hire dates for system seniority bidding purposes. The Union Pacific and UTU representatives were told at that time that the plaintiffs did not agree to the provisions.

Meanwhile, in August, 1988, Associate General Chairman Hollis had raised the question as to why the former Rock Island employees did not receive their original Rock Island seniority date. UTU General Counsel Clinton J.

Miller, III, requested UTU's counsel in the Volkman litigation, Norton N. Newborn, to review the outstanding court orders in the Volkman case with regard to this issue. By letter dated August 27, 1998, Mr. Newborn responded to Mr. Miller's inquiry, noting that the prior rights granted by the 1982 Implementing Agreement and approved or modified by the court were "subject to modification through future collective bargaining[.]" Although he thus indicated that the plaintiffs' prior rights were subject to modification, he added that the UTU had often taken the position that maintaining prior rights was the industry standard and observed that "[t]his would seem to be one of those case where the spirit and the letter of the matter were moving in different directions."

UTU President Little then scheduled a meeting in Seattle, Washington, for September 23-34, 1998, of the assigned UTU Vice-Presidents, the involved General Chairmen, UTU Assistant President B.A. Boyd and General Counsel Miller, to discuss Associate General Chairman Hollis' concerns and Mr. Newborn's letter. During that meeting, it was once again explained to Mr. Hollis why the UTU did not grant former Rock Island employees their old Rock Island seniority dates. Once again, it was made clear that the former Rock Island employees would be required to use their seniority dates with the SSW on the dovetailed roster. It was also confirmed, however, that the former Rock Island employees who had prior rights on the Tucumcari Line would retain those rights vis-à-vis other SSW employees.

Union Pacific began operating under the terms of the St. Louis Hub Implementing Agreement on November 1, 1998.

In the fall of 1998, Union Pacific and the UTU tentatively agreed upon an Implementing Agreement to govern the Salina Hub. This Agreement likewise provided for employees to be dovetailed onto the merged seniority roster based upon their "current seniority dates," i.e. their date of hire on the property in which they were last

employed. The Agreement also provided that "all pre-existing prior rights .... are of no further force or effect and the provisions of this Article shall prevail in lieu of thereof."

On November 2, 1998, with the concurrence of the UTU General Chairman, including Don Hollis, Union Pacific served notice of its intent to implement the Salina Hub Implementing Agreement on January 16, 1998, and scheduled a seniority selection workshop for the week of November 16, 1998, to construct a consolidated seniority roster for this Hub. The seniority workshop was conducted as scheduled, in Omaha, Nebraska. Thirteen UTU Local Chairmen attended. They contacted each individual affected employee and solicited his or her decision as to whether or not they wished to place themselves within the Salina Hub. The workshop concluded on November 20, 1998.

As a result of continuing questions raised by Associate General Chairman Hollis, and in order to discuss other issues regarding the implementation of the St. Louis and Kansas City Hubs, a conference was scheduled on December 2, 1998, between Union Pacific and the UTU. Among the items discussed at that conference was the fact that former Rock Island employees in the St. Louis and Kansas City Hubs thought they should have been permitted to use their original Rock Island seniority dates for the dovetailed rosters. Once again, UTU and UP officials stated that there was no legal support for granting the former Rock Island employees different seniority dates than the dates they held on the SSW. Associate General Chairman Hollis was present and again raised the issue of the Rock Island employees' prior rights over the SSW employees with respect to the Tucumcari Line. Union Pacific representatives reiterated that the former Rock Island employees on the Tucumcari Line would retain their prior rights vis-à-vis the other SSW employees. In their letter of January 10, 1999, UTU Vice Presidents Paul C. Thompson and M.B. Futhey, Jr., affirmed this understanding. Karstetter Declaration, Exh.

18. In their letter, they noted that Mr. Hollis had previously agreed to this arrangement.

Notwithstanding the apparent agreement reached at the December 2 meeting, on December 28, 1998, UTU General Chairman Hollis indicated he was unwilling to sign the Salina Hub Implementing Agreement. He refused to initial the Agreement because the former Rock Island employees insisted that their dates of hire with the Rock Island be used to form the integrated seniority roster, rather than their dates of hire with the SSW. Under the UTU Constitution, the tentative agreement could not be submitted for ratification absent approval of all General Chairmen in the affected jurisdiction.

Accordingly, on January 5, 1999, Union Pacific invoked arbitration under Article I, Section 4 of the New York Dock conditions to obtain an Implementing Agreement for the Salina Hub.

On January 12, 19999, plaintiffs Spaulding, Swonger, Inman and Nance filed a Motion for Contempt of Court and Motion for Temporary Restraining Order and Temporary and Permanent Injunction in the Volkman case against the Union Pacific and the UTU. Plaintiffs alleged that they were members of the class of plaintiffs in the Volkman case and that the Kansas City Hub Implementing Agreement and the tentative Salina Hub Implementing Agreement violated the court's injunctive and settlement orders in Volkman by eliminating plaintiffs' prior rights. They sought preliminary and permanent injunctive relief to prevent Union Pacific and the UTU from awarding jobs in the Kansas City and Salina Hubs in a manner inconsistent with the injunctive relief previously awarded in Volkman. In a telephone conference held on January 14, 1999, and by written order dated January 21, 1999, the court denied plaintiff's motion for temporary restraining order. The court found that the denial was appropriate because plaintiffs failed to show that their claims were likely to prevail and because "plaintiffs appear to have other remedies available to them, including arbitration."

Union Pacific implemented the Kansas City Hub on January 16, 1999.

The matter of the Salina Hub Implementing Agreement was submitted to arbitration before Neutral Referee William E. Fredenberger, Jr. Plaintiffs James Spaulding and Lyn Swonger participated, through counsel, in both the filing of a written submission and in oral argument before the Referee held February 23, 1999. Plaintiffs Spaulding and Swonger argued that former Rock Island employees were "denied the right to use their hire date" and "forced to use an artificial date of March 24, 1980" – the date imposed by the court in Volkman, 724 F.Supp. at 1307, 1327-28.

On March 25, 1999, Neutral Referee Fredenberger issued his decision adopting the tentative agreement that Union Pacific and the UTU had negotiated as the Implementing Agreement for the Salina Hub. That Agreement provides for the creation of a master seniority roster through dovetailing based upon date of hire with the employees' pre-merger carrier, for the creation of three seniority zones within the roster, and for the maintenance or creation of prior rights in each zone.

The arbitrator explained that there was nothing "unfair to former SSW or Rock Island Trainmen in the seniority provisions of the proposed implementing agreement," and that the proposed agreement "represent[ed] a fair and equitable method of blending the rights of those employees with those of other Carrier affected employees." The arbitrator also rejected Plaintiffs' claim that the proposed agreement conflicted with the court's rulings in the Volkman litigation:

> [t]he Court's Decision and Orders specifically provide that the seniority rights granted the former Rock Island employees are subject to modification through future collective bargaining and that any disputes concerning those rights are to be handled through the grievance and arbitration procedures

> mandated by the Railway Labor Act and/or the Interstate Commerce Act . . . Accordingly, to the extent the Court's Decisions and Orders may have application to the former Rock Island employees involved in this case the undersigned does not find the Court's Decisions and Orders have insulated the existing seniority rights of those employees against change through Article I., Section 4 of the New York Dock Conditions.

In April, 1999, plaintiffs Spaulding and Swonger, on behalf of themselves and other similarly-situated former Rock Island trainmen, petitioned the Surface Transportation Board ("STB") for review of the Fredenberger Award and moved to stay implementation of the award. By decision dated April 29, 1999, the STB denied the motion for stay, and on May 1, 1999, Union Pacific implemented the Salina Hub.

On June 2, 1999, plaintiffs filed the complaint that initiated this action. In this action, plaintiffs allege that the UTU and Union Pacific vitiated the seniority rights and prior rights to which they were entitled, by agreeing to the St. Louis, Kansas City and Salina Hub Implementing Agreements. Plaintiffs charge the UTU with breach of its duty of fair representation and the Union Pacific with violation of its collective bargaining agreement with the UTU.

On May 1, 2000, the STB denied plaintiffs' petition to set aside the Fredenberger Award imposing an implementing agreement between UTU and Union Pacific.

II. Defendants' Arguments on Summary Judgment

Defendants UTU and Union Pacific argue they are entitled to summary judgment for the following reasons: (1) because plaintiffs' claims are barred by collateral estoppel in view of the Volkman litigation; (2) because plaintiffs' claims regarding the St. Louis and Kansas City Hubs are barred by the statute of limitations; (3) because plaintiffs' challenge regarding the Salina Hub is an attack on the arbitrator's

ruling, and is thus within the exclusive jurisdiction of the Surface Transportation Board and the U.S. Court of Appeals; (4) because the claims are subject to mandatory arbitration under the Railway Labor Act; and (5) because plaintiffs' sole remedy for any injury suffered is the relief provided by the New York Dock conditions. Plaintiffs challenge each of these asserted reasons.

III. Summary Judgment Standards.

The standards and procedures for summary judgment are well established and will not be fully repeated here. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). In essence, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Id. A disputed fact is "material" if it might affect the outcome of the suit under the governing law, and a dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

IV. Discussion.

A. Collateral Estoppel.

The defendants point out that the Volkman court found the plaintiffs were not entitled to "carryover seniority"[4] under the March 4 and 1982 Implementing Agreements (SSW's takeover of the Tucumcari Line) and further ruled that plaintiffs' prior rights were subject to modification through future collective bargaining. According to the defendants, these two findings are inconsistent with plaintiffs' claims in this action and the claims are thus barred by collateral estoppel. In response, plaintiffs argue that the

[4] In other words, plaintiffs' system seniority date on the Rock Island did not carry over to their new employment with the SSW. Instead, plaintiffs were assigned an SSW system seniority date of March 24, 1980. As plaintiffs point out, they were awarded prior rights or "point seniority" on the SSW Tucumcari Line.

Volkman decision "cannot be seen as having looked at the actions of the union (UTU) relating to the 1996 UP/SP merger and the Implementing Agreements negotiated thereafter in 1997 through 1999." Plaintiffs contend that the issue is not the question of carryover rights under the March 4 Agreement, but "rather is protection of the seniority that was established by this Court in the Volkman case decisions and the fact that the UTU, in collusion with the Union Pacific, has deprived them of all of that protected seniority."

Under the doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigation of the issue in a suit on a different cause of action involving a party to the first case. Murdock v. Ute Indian Tribe of Uintah Ouray Reservation, 975 F.2d 683, 686 (10th Cir. 1992). In the Tenth Circuit, four elements must be present for collateral estoppel to apply: (1) the issue presented in the prior action is identical to the one now in question, (2) the first case was a final judge on the merits, (3) the party against whom the doctrine is invoked was a party to the first litigation or in privity with a party to the prior litigation, and (4) the party against whom it is raised had a full and fair opportunity to litigate the issue in the prior action. Dodge v. Cotter Corp., 203 F.3D 1190, 1198 (10th Cir. 2000).

By virtue of collateral estoppel, the Volkman judgment prevents the plaintiffs from claiming in this action that they had carryover seniority with the SP or that the prior rights obtained in that litigation could not be modified through future collective bargaining. Such facts, however, are not necessarily essential to the plaintiffs' claim that the UTU breached a duty of fair representation in connection with the SP/UP merger. For example, plaintiffs allege that the UT breached its duty by failing to adopt and present a unified position in negotiations and arbitration and by conspiring with the UP to select an arbitrator known to be favorable to carriers. Such allegations would not require a showing that plaintiffs had carryover seniority or that their prior rights

were not subject to modification through negotiation.[5] Accordingly, the defendants are not entitled to judgment by reason of collateral estoppel.

B. Statute of Limitations.

Claims for breach of the duty of fair representation under the Railway Labor Act are subject to a six month limitations period. See DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 155 (1983); Repstine v. Burlington Northern, Inc., 149 F.3d 1068, 1070-71 (10th Cir. 1998). The defendants point out that plaintiffs' complaint was filed more than six months after the St. Louis and Kansas City Hub Implementing Agreements were executed, and they argue that any claim based on the UTU's representation in those agreements is barred. In response, plaintiffs contend that a UTU official misled them into believing that they would be able to use their Rock Island seniority hire date or that the issue was still open for resolution and would be negotiated, and UTU is thus equitably estopped from asserting the limitations bar. Second, they contend the statute of limitations was tolled while they pursued internal appeals under the UTU Constitution.

The statute of limitations begins to run "when an employee knows or in the exercise of reasonable diligence should have known or discovered the acts constituting the union's alleged violations." Lucas v. Mountain States Tel. &

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[5] Plaintiffs also allege that the UTU breached provisions of the UTU constitution "giving these Plaintiffs and class members rights as to preservation of their seniority rights in mergers" and that UTU breached its duty of fair representation by not following its constitutional provisions relating to seniority. Complaint, ¶¶26 & 27. This is an apparent reference to a provision in the UTU constitutional stating that "[p]rior seniority rights of employees to service on their former seniority district or territory shall be preserved to the extent possible." Karstetter Declaration, Exh. 8, UTU Constitution, Article 90. Although the court concludes infra that this claim fails for other reasons, it is not barred by collateral estoppel because the question of whether it was possible to preserve the plaintiffs' prior rights in the SP/UP merger was not decided by Volkman. It was, however, an issue in the Salina Hub arbitration.

Tel., 909 F.2d 419, 420-21 (10th Cir. 1990). Some of the alleged violations in this case, specifically those relating to the Salina Hub arbitration, are clearly within the limitations period. Insofar as plaintiffs allege that the UTU breached a duty in negotiating the St. Louis and Kansas City Hub Implementing Agreements, however, the plaintiffs were on notice of the facts underlying such a claim by the time those agreements were executed in July of 1998. Cf. Landry v. Air Line Pilots Ass'n. Intern. AFL-CIO, 901 F.2d 404, 411 (5th Cir. 1990) (Plaintiffs' cause of action accrued when the agreement was signed). Even before that, UTU officials had made clear during planning meetings with affected Locals that current system seniority dates, and not Rock Island seniority dates, would be used in dovetailing the rosters. The Implementing Agreements expressly provided that employees would be dovetailed into a single roster using their "current seniority date" and that "[a]ll preexisting prior rights . . . are of no further force or effect and the provisions of this article shall prevail in lieu of thereof." At a minimum, plaintiffs knew or should have known of the union's position regarding their seniority by September 24, 1998, when consolidated seniority rosters were constructed pursuant to the Implementing Agreements.[6] Shortly after these September meetings, Don Hollis, the General Chairman representing SSW employees, wrote a letter to the Union Pacific on October 3, 1998, objecting to the arrangement and claiming that the implementing agreements were in violation of federal law because the "seniority rosters showed the

[6] It is uncontroverted that at Local meetings in Wichita and Coffeyville, Kansas, Don Hollis, who represented the former Rock Island employees, asked UTU Associate General Chairman Richard Karstetter whether the former Rock Island employees would be able to use their Rock Island seniority dates on the consolidated roster, and that Karstetter told Hollis and others that the former Rock Island employees would be integrated into the list using their SSW seniority dates. It is also uncontroverted that by August of 1998, Hollis was informally objecting to the UTU's position with respect to the plaintiff's seniority.

former Rock Island Employees dovetail in which a 1980 date with no consideration of prior rights." Local Chairman Gene Clyma was sent a copy of the letter.

Plaintiffs now claim the statue of limitations was tolled because Hollis allegedly represented to them (at some unspecified times) that the seniority issue was not foreclosed and would be revisited, or that thy should not worry because he would see to it they got their seniority.[7] The court cannot accept that these alleged representations tolled the statute of limitations. Plaintiffs may have reasonably hoped that Hollis could convince the union to change its previous position, but they could not reasonably believe the union had not yet taken a position, which is essentially what they are arguing. Nor could they reasonably believe that Hollis could unilaterally change their status under the previously executed Implementing Agreements. Of. Landry, 901 F.2d at 412-13 (plaintiffs were on "inquiry notice" of the acts that formed the basis of their claim more than six months before they filed suit; they had a duty to exercise reasonable diligence). The Kansas City and St. Louis Implementing Agreements had been executed by all of the UTU General Chairmen, including Mr. Hollis. Even prior to execution of those agreements, plaintiffs understood the UTU's position that their Rock Island seniority dates would not be used on the consolidated roster. In fact, at the planning meetings the plaintiffs say that they "made it clear that [the union's position] was not agreeable and would be appealed and contested." See Doc. 46 ¶19. Yet no timely internal appeal was filed after execution of the agreements or after construction of the dovetailed roster. Clearly, Hollis' objections in his letter of October 3, 1998, represented a reversal of his previous position, and the letter touched off a

[7] Plaintiffs assert what are essentially contradictory positions, arguing on the one hand that Hollis told them that the agreement in fact allowed them to use their Rock Island hire date, and on the other hand arguing that Hollis told them the issue "would continue to be contested' and that "the protest was ongoing." Pl. Resp. to UTU Motion at 61.

new round of discussions with the union about plaintiffs' seniority. But the fact that the union again reviewed plaintiffs' objections and re-examined its prior decision did not have the effect of re-starting the limitations period. Nor was the UTU's subsequent reiteration of its position at the December 1-2 meetings in 1998 a new determination that started the statute of limitations running anew; it was a reiteration of the union position previously negotiated, adopted and embodied in the Implementing Agreements. CF. Plaintiffs' Memorandum at 34 ("Mr. Hollis was not successful in dissuading the UTU and the UP from following the course they had previously set.").

Plaintiffs correctly point out that pursuit of an internal union appeal can toll the statue of limitations. But Mr. Hollis' informal objections of his October 3, 1998 letter to the Union Pacific Railroad cannot be regarded as an invocation of the UTU's internal appeal procedures. CF. Christiansen v. APV Crepaco, Inc., 178 F.2d 910, 916 (7th Cir. 1999) (limitations period not tolled while plaintiff informally sought help from union officials; otherwise plaintiffs could indefinitely toll the limitations period by making recurrent requests for help) Pantoja v. Holland Motor Express, Inc., 965 F.2d 323, 327 (7th Cir. 1992) ("Prolonged inaction is sufficient to give a diligent plaintiff notice that the Union has breached its duty of fair representation"; plaintiff should have "realize[d] that the union would not help him and that he needed to bring suit himself"). The first formal appeal filed by any of the plaintiffs in accordance with the UTU provisions appears to be James Spaulding's appeal filed on February 20, 1999. Doc. 46, Exh. 4. UTU International President Charles Little rejected his filing on March 22, 1999, without referring it to the Board of Appeals, apparently on the grounds that he did not consider it to be timely. Id., Exh. 5. The time in which that appeal was pending – approximately one month – might be properly excluded from the limitations period. Cf. Repstine v. Brulington Northern, Inc., 149 F.3d 1068, 1071 (10th Cir. 1998). Even so,

plaintiffs' complaint was not filed until June 2, 1999 – about eight months after the consolidated rosters from the St. Louis and Kansas City hubs were first constructed, and almost a year after the two Implementing Agreements have been executed. The relatively short six-month limitation period governing claims of this type furthers important national interests, including the benefits of stable bargaining relationships and finality of private settlements. See DelCostello v. Inern. Brotherhood of Teamsters, 462 U.S. 151, 171 (1983). Although there may be circumstances that excuse a plaintiff's failure to file suite in a timely manner, no such circumstances are present here. The court finds no genuine issue of material fact relating to tolling, and concludes that any claim for breach of the duty of fair representation arising out of the UTU's negotiation on the St. Louis and Kansas City Hub Implementing Agreements is barred by the statue of limitations.

C. New York Dock Arbitration & Jurisdiction of the Surface Transportation Board. The defendants next argue that plaintiffs' duty of fair representation ("DFR") claim is an improper collateral attack on the arbitrator's award adopting the Salina Hub Implementing Agreement. The defendants point out that some of the plaintiffs were permitted to participate in the arbitration proceeding, where they argued that the proposed agreement unfairly and improperly required them to forfeit seniority rights. The arbitrator rejected their contentions, finding that the proposed agreement "represents a fair and equitable method of blending the rights of (the plaintiffs) with those of other employees." He further found that the proposed agreement's modification of plaintiffs' seniority rights was warranted by the public transportation benefit arising from the implementation of a hub and spoke system at Salina. He determined that the proposed agreement did not contradict the court's orders in Volkman, noting that in Volkman the court made clear that plaintiffs' prior rights were subject to modification through future collective bargaining. The defendants point out that under New York

Dock, the arbitrator was required to determine if the proposed agreement merged the respective railroad work forces according to a fair arrangement. See 49 U.S.C. § 11326. The Surface Transportation Board had exclusive jurisdiction to review the arbitrator's ruling, and the STB has now declined to disturb that ruling. Under the circumstances, defendants believe the plaintiffs are attempting "to circumvent the exclusive jurisdiction of the STB to review arbitration awards conducted pursuant to New York Doc." UTU Mem. At 37.

In response, the plaintiffs argue that the arbitrator's ruling has no effect on their DFR claim because a DFR claim is based on the conduct of the union, which was not an issue before the arbitrator. They point out that the arbitrator heard no evidence on, and did not determine, whether the UTU failed to follow its constitution, whether it failed to adopt a unified position in the arbitration, or whether it conspired with the carrier to select a biased arbitrator, all of which are alleged in support of the DFR claim. Moreover, plaintiffs contend the arbitrator's decision is voidable because it was a "sham" proceeding brought about by the union's violation of its duty of fair representation. Plaintiffs Memorandum at 67.

Even though a DFR claim may sometimes be separate and distinct from the issues involved in arbitration, and a breach of the union's duty may make an arbitration award voidable, the court cannot find that such is the case here. "A duty-of-fair-representation claim arises when a union that represents an employee in a grievance or arbitration procedure act in a "discriminatory, dishonest, arbitrary, or perfunctory' fashion." International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 864 n. 6 (1987). Likewise in negotiating a collective bargaining agreement, a union has a duty to act in good faith and honesty of purpose in the exercise of its discretion. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). See also Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 76-77 (1991). In this case, the gravaman of plaintiffs' DNR claim is that the union

discriminated against them and acted arbitrarily because it negotiated a proposed agreement that "improperly eliminated existing Rock Island and SSW seniority and gave improper and unfair preference to other UP employees, including former Union Pacific employees." Complaint, ¶ 22. The agreement allegedly "failed to provide for these Plaintiffs and class members to maintain their prior rights and other seniority and equity rights vis-à-vis other members of the UTU, all in violation of their rights under the law, the pre-merger agreement, the constitution of the UTU and the Orders and Settlement Agreement of the previous litigation." Id. at 23. The UTU allegedly "abused or unfairly used (its right to establish seniority) to abridge the rights of these Plaintiffs and class members." Id. at ¶ 27(f). The vast majority of plaintiffs' allegations necessarily depend upon a determination of whether the implementing agreement fairly blended the rights of the plaintiffs with the rights of other employees, and whether the changes brought about by the agreement were necessary to produce a public transportation benefit. Such issues, however, were squarely within the scope of the dispute presented to the arbitrator.

The Interstate Commerce Act grants the STB exclusive authority to examine, condition, and approve proposed mergers of transportation carriers within its jurisdiction. See Norfold & W. Ry. Co. v. Brotherhood of R.R. Signalmen, 164 F.3d 847, 854 (4th Cir. 1998); 49 U.S.C. §11321. The STB typically accomplishes its statutory obligation to protect employees from the adverse effects of mergers by conditioning its approval upon imposition of the New York Dock conditions. See Norfold & Western R. Co. v. Am. Train Dispatchers' Ass'n., 499 U.S. 117, 121 (1991). Under Article I, Section 4 of New York Dock, when a railroad proposes a merger of forces, the railroad and the union are to negotiate an appropriate and acceptable arrangement of work forces. If they cannot agree, they may submit the dispute to a neutral referee, whose decision is "final, binding and conclusive . . ." See Karstetter

Declaration, Exh. 4. [8] The STB's authority in carrying out an approved merger extends to altering existing seniority rights existing under pre-merger collective bargaining agreements:

> Recognizing that consolidations in the public interest will "result in wholesale dismissals and extensive transfers, involving expense to transferred employees" as well as the "loss of seniority rights," [], the Act imposes a number of labor protecting requirements [i.e. the New York Dock conditions] to ensure that the Commission (now the STB) accommodates the interests of affected parties to the greatest extent possible. [] Section 11341(a) guarantees that once these interests are accounted for and once the consolidation is approved, obligations imposed by laws such as the RLA [including collective bargaining agreements] will not prevent the efficiencies of consolidation from being achieved.

Norfolk & Western R. Co., 499 U.S. at 132-33. The essence of plaintiffs' claim in this case is that the changes in their seniority brought about under the implementing agreements were not necessary and that the union unfairly advocated those unnecessary changes. But the STB found that the changes were necessary. Insofar as plaintiffs claim that the UTU breached its duty by negotiating or advocating a proposed implementing agreement that unfairly deprived them of seniority rights, the court concludes for the reasons set for above that their claim is within the exclusive jurisdiction of the STB. [9] ("Plaintiffs' requests for relief

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[8] As previously stated, the arbitrator's decision is subject to review by the STB and the federal appellate courts.

[9] The court previously determined that plaintiffs' DNR claims relating to the Kansas City and St. Louis Hub Implementing Agreements are barred by the statute of limitations. Even assuming that is not the case, the court agrees with Union Pacific that such claims are barred here because they fall within the scope of the mandatory arbitration provisions of Article 1,

would require this court to substitute its judgment as to what was necessary to effectuate the merger for that of the STB...") As such, this court has no jurisdiction to review the claim.

It is true that in other settings the Supreme Court has said an employee may go behind a final and binding arbitration award if the employee can demonstrate that a breach of duty by the union seriously undermined the integrity of the arbitral process. See United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 61 (1981); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976) (plaintiff entitled to relief if he can prove "an erroneous discharge" and a union "breach of duty tainting the decision of the joint committee"). Plaintiffs apparently contend the arbitral process was tainted here because the union allegedly "conspired and/or cooperated with the UP in the selection of an arbitrator known to be favorable to carriers, "it, "did not develop and present a unified position," and it "conspired and/or cooperated with the UP in opposing these Plaintiffs' attempts to obtain relief through arbitration." Complaint, ¶27. Even assuming that Hines and its progeny apply to an STB-sponsored arbitration, the court finds that plaintiffs' allegations fail to create a genuine issue of material fact for several reasons. First, as defendants point out, the STB has the responsibility to ensure that arbitration awards issued under its authority are "procedurally fair and impartial." Chicago & North Western Transp. Co. – Abandonment, 3 I.C.C. 2d 729, 1987 ICC LEXIS 343, *16 ("Lace Curtain"), aff'd sub nom. Int'l Broth. Of Elec. Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988). Despite this, plaintiffs raised no timely objection to any procedures in the arbitration hearing or in the STB review, and they offer no reason for having failed to do so. The Court concludes that this failure to challenge matters like the alleged bias of the arbitrator in the

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Section 11 of the New York Dock conditions. See UP Memorandum at 24-25.

prior proceedings precludes review of such issues here. Moreover, plaintiffs offer no competent evidence that the integrity of the arbitration process was in fact seriously undermined. Insofar as arbitrary conduct is concerned, a union breaches the duty of fair representations "only if (it's conduct) can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary.' Marquez v. Screen Actors Guild, 535 U.S. ____, 142 L.Ed.2d 242, 255(1988). Plaintiffs fail to cite any competent evidence that the union violated this standard. For example, plaintiffs claim that the union's conduct was arbitrary because the UTU failed to argue in the Salina Hub arbitration, as it had in the March 1997 Yost Arbitration dealing with proposed implementing agreements at the Denver and Salt Lake City Hubs, that the changes in seniority under the proposed agreements were unnecessary to produce a public transportation benefit. Plaintiffs fail to acknowledge, however, that the arbitrator in Yost rejected the union's argument and found that the changes were necessary, and the STB upheld that ruling. Under the circumstance, it was not arbitrary for the UTU to avoid asserting a position that was likely to fail and instead attempting to make the best agreement it thought possible under the circumstances. CF. Air Line Pilots, 499 U.S. at 79(union's decision was not arbitrary viewed in light of the legal landscape at the time). Plaintiffs also allege that the union "failed to adopt a unified position," but the union was asserting the same position in arbitration that had already been unanimously agreed to and ratified in the St. Louis and Kansas City Hub Implementing Agreements. All of the UTU General Chairpersons, including Mr. Hollis, had already agreed that a dovetailed seniority roster, based on date of hire on the respective properties (with a proviso that other SSW employees would come after the plaintiffs in seniority on the Tucumcari line), was the appropriate manner of implementing the merger agreement. Finally, plaintiffs complain because the union decided to recommend against their position in the

arbitration. The fact that the union's position was adverse to the plaintiffs, however, does not by itself mean its representation was in bad faith. Cf. Rucker v. St. Louis Southwestern Ry. Co., 917 F.2d 1233, 1239 (10th Cir. 1990). Under the circumstances, it was not arbitrary for the UTU to take the same position in the Salina Hub Arbitration that it had previously agreed to. In sum, the court sees nothing in the record to suggest that the union's actions were irrational or that the integrity of the arbitration proceeding was somehow tainted by a breach of duty by the UTU.[10] Accordingly, the court concludes that the defendants are entitled to judgment as a matter of law.

D. Remaining Arguments.

The UP also argues that the Court lacks jurisdiction because plaintiff's claim constitutes a "minor dispute" subject to mandatory arbitration under the Railway Labor Act. See Consolidated Rail Corp. v. Railway Labor Exec. Ass'n., 491 U.S. 299 (1989). Additionally, the defendants

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[10] In addition to the arguments above, plaintiffs also complain that the UTU discriminated against them because it proposed allowing former MOP employees to use their MOP date of hire on the consolidated roster, but it would not advocate allowing former Rock Island employees to use their Rock Island date of hire. The standard proposed by the UTU – using the employees' date of hire on their respective properties (i.e., the UP and the SP) – was clearly a rational one and was neutral on its face. The alleged disadvantage plaintiffs suffered from this standard was not due to union discriminatin, but was a result of the plaintiffs being differently situated than the former MOP employees. Under the previous merger agreement between the MOP and the UP, MOP employees were permitted to retain their MOP seniority dates after the merger. By contrast, because the Rock Island railroad had gone bankrupt, former Rock Island employees were considered to have severed their employment with the Rock Island when they were hired by the SSW. The result of this was that their system seniority date on the SSW became their date of hire with the SSW rather than their date of hire on the Rock Island. Under the circumstances, it was not irrational or discriminatory for the UTU to advocate that each group of employees should retain the same system seniority date they held on their respective properties going into merger.

argue that plaintiffs are not entitled to any remedy in this action because they have full economic protection against any adverse effects of the merger by virtue of the New York Dock conditions. In view of the ruling above that plaintiffs' claims fail by reason of the statute of limitations, the exclusive jurisdiction of the STB, and the lack of evidence that the arbitration was tainted, the court need not address these additional arguments asserted by the defendants.

V. Class Action Determination.

Although the complaint alleges that this action was brought on behalf of all others similarly situated to the named plaintiffs[11], plaintiffs did not move for certification of the matter as a class action and the court has made no determination of whether it should be maintained as one. After reviewing the materials submitted on summary judgment, the court finds it would be inappropriate at this time to certify the matter as a class action. On the materials presented the court cannot find that the prerequisites for a class action in Fed. R. Civ. P. 23(a) are present. In particular, the court believes the claims of the representative parties may not be typical of the class and that the representatives may not be able to adequately protect the interests of the class in light of the differing situations faced by purported class members at each of the three hubs in questions.

VI. Conclusion.

The United Transportation Union's Motion for Summary Judgment (Doc. 27) and the Union Pacific Railroad Company's Motion for Summary Judgment (Doc. 31) are GRANTED for the reasons set forth in this order. The clerk

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[11] The complaint identifies the class as the named plaintiffs "and all others who work for the UP in the St. Louis Hub, the Kansas City Hub and/or the Expanded Salina Hub and who worked for the Rock Island or SP as trainman and switchman and who have been or will be deprived of contractual, statutory or other rights relating to craft seniority, compensation or employment rights on the Tucumcari Line as a result of Defendant's conduct." Complaint ¶6.

of the court is directed to enter a judgment of dismissal in favor of the defendants and against the plaintiffs.

IT IS SO ORDERED this 29th day of December, 2000, at Wichita, KS.

"s/Wesley E. Brown"
Wesley E. Brown, U.S. Senior District Judge

STATUTORY PROVISIONS INVOLVED

49 U.S.C. §11321 formerly known as 49 U.S.C. § 11341

(a) The authority of the Board under this subchapter is exclusive. A rail carrier or corporation participating in or resulting from a transaction approved by or exempted by the Board under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

(b) A power granted under this subchapter to a carrier or corporation is in addition to and changes its powers under its corporate charter and under State law. Action under this subchapter does not establish or provide for establishing a corporation under the laws of the United States.

49 U.S.C. § 11324. Consolidation, merger, and acquisition of control: conditions of approval

(a) The Board may begin a proceeding to approve and authorize a transaction referred to in section 11323 of this title on application of the person seeking that authority. When an application is filed with the Board, the Board shall notify the chief executive officer of each State in which property of the rail carriers involved in the proposed transaction is located and shall notify those rail carriers. The Board shall hold a public hearing unless the Board determines that a public hearing is not necessary in the public interest.

(b) In a proceeding under this section which involves the merger or control of at least two Class I railroads, as defined by the Board, the Board shall consider at least--

(1) the effect of the proposed transaction on the adequacy of transportation to the public;

(2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;

(3) the total fixed charges that result from the proposed transaction;

(4) the interest of rail carrier employees affected by the proposed transaction; and

(5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.

(c) The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Board may impose conditions governing the transaction, including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities. Any trackage rights and related conditions imposed to alleviate anticompetitive effects of the transaction shall provide for operating terms and compensation levels to ensure that such effects are alleviated. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Board may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. The Board may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Board finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two Class I railroads, as defined by the Board, the Board shall approve such an application unless it finds that--

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Board shall, with respect to any application that is part of a plan or proposal developed under section 333(a)-(d) of this title, accord substantial weight to any recommendations of the Attorney General.

(e) No transaction described in section 11326(b) may have the effect of avoiding a collective bargaining agreement or shifting work from a rail carrier with a collective bargaining agreement to a rail carrier without a collective bargaining agreement.

(f)(1) To the extent provided in this subsection, a proceeding under this subchapter relating to a transaction involving at least one Class I rail carrier shall not be considered an adjudication required by statute to be determined on the record after opportunity for an agency hearing, for the purposes of subchapter II of chapter 5 of title 5, United States Code.

(2) Ex parte communications, as defined in section 551(14) of title 5, United States Code, shall be permitted in proceedings described in paragraph (1) of this subsection, subject to the requirements of paragraph (3) of this subsection.

(3)(A) Any member or employee of the Board who makes or receives a written ex parte communication concerning the merits of a proceeding described in paragraph (1) shall promptly place the communication in the public docket of the proceeding.

(B) Any member or employee of the Board who makes or receives an oral ex parte communication concerning the merits of a proceeding described in paragraph (1) shall promptly place a written summary of the oral communication in the public docket of the proceeding.

(4) Nothing in this subsection shall be construed to require the Board or any of its members or employees to engage in any ex parte communication with any person. Nothing in this subsection or any other law shall be construed to limit the

authority of the members or employees of the Board, in their discretion, to note in the docket or otherwise publicly the occurrence and substance of an ex parte communication.

49 U.S.C. § 11326 formerly known as 49 U.S.C. § 11347

(a) Except as otherwise provided in this section, when approval is sought for a transaction under sections 11324 and 11325 of this title, the Board shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under section 5(2)(f) of the Interstate Commerce Act before February 5, 1976, and the terms established under section 24706(c) of this title. Notwithstanding this part, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Board (or if an employee was employed for a lesser period of time by the rail carrier before the action became effective, for that lesser period).

(b) When approval is sought under sections 11324 and 11325 for a transaction involving one Class II and one or more Class III rail carriers, there shall be an arrangement as required under subsection (a) of this section, except that such arrangement shall be limited to one year of severance pay, which shall not exceed the amount of earnings from the railroad employment of that employee during the 12-month period immediately preceding the date on which the application for approval of such transaction is filed with the Board. The amount of such severance pay shall be reduced by the amount of earnings from railroad employment of that employee with the acquiring carrier during the 12- month period immediately following the effective date of the transaction. The parties may agree to terms other than as provided in this subsection.

(c) When approval is sought under sections 11324 and 11325 for a transaction involving only Class III rail carriers, this section shall not apply.

28 U.S.C. § 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, or 41 of the Shipping Act, 1916 (46 U.S.C. App. 802, 803, 808, 835, 839, and 841a) or pursuant to part B or C of subtitle IV of title 49; and

(B) the Federal Maritime Commission issued pursuant to--

(i) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);

(ii) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

(iii) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d);

[(iv) and (v) Redesignated (ii) and (iii)]

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

NEW YORK DOCK CONDITIONS - APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

1. Definitions. -- (a) "Transaction" means any action taken pursuant to authorizations of this Commission **[*60]** on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in **[*61]** accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does **[*62]** not so elect; provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. Notice and agreement of decision. -- (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the

interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior [*63] to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five [*64] (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. Displacement allowances. -- (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during the protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation **[*65]** received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position [*66] he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal of justifiable cause.

6. Dismissal allowances. -- (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first [*67] deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so re-employed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return [*68] to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. Separation allowance. -- A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits. -- No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present [*69] authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses. -- Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided [*70] above, assume the expenses, et cetera, for any employee furloughed with three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes. -- (a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controvesy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute [*71] or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to selects its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failure such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad [*72]

will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal. -- (a) The following, conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive dismissal allowance) who is required to change the point of his employment [*73] within his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an un-expired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be [*74] considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a [*75] third appraiser whose designation will be binding upon the parties.

A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training of retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who **[*76]** had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately

incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprises within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish [*77] one convenient central location for each terminal or other enterprises for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party [*78] may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 U.S.C. 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent to this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 U.S.C. 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.